DOCKET

No. 13-1412

Title:	City and County of San Francisco, California, et al., Petitioners v. Teresa Sheehan
Docketed:	May 27, 2014
Lower Ct:	United States Court of Appeals for the Ninth Circuit
Case Nos.:	(11-16401)
Decision Date:	February 21, 2014

Questions Presented

---Date---	------Proceedings and Orders----------
May 22 2014	Petition for a writ of certioran filed. (Response due June 26, 2014)
May 29 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counselt for the petitioner
Jun 3 2014	Waiver of right of respondent Teresa Sheehan to respond filed.
Jun 3 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.
Jun 18 2014	DISTRIBUTED for Conference of September 29, 2014.
Jun 23 2014	Response Requested. (Due July 23, 2014)
Jun 26 2014	Brief amici curiae of California State Association of Counties, et al. filed. (Distributed)
Jun 26 2014	Brief amici curiae of International Municipal Lawyers Association, and National Sheriffs' Association filed.
Jul 9 2014	Order extending time to file response to petition to and including September 9, 2014.
Aug 14 2014	Order further extending time to file response to petition to and including October 14, 2014.
Oct 13 2014	Brief of respondent Teresa Sheehan in opposition filed.
Oct 23 2014	Reply of petitioners City and County of San Francisco, California, et al. filed.
Oct 29 2014	DISTRIBUTED for Conference of November 14, 2014.
Nov 17 2014	DISTRIBUTED for Conference of November 25, 2014.
Nov 25 2014	Petition GRANTED. Justice Breyer took no part in the consideration or decision of this petition.
Dec 17 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for petitioners.
Dec 18 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.
Jan 9 2015	Joint appendix filed (2 volumes). (Statement of costs filed)
Jan 9 2015	Brief of petitioners City and County of San Francisco, California, et al. filed.
Jan 16 2015	Brief amicus curiae of the United States supporting vacatur in part and reversal in part filed.
Jan 16 2015	Brief amici curiae of National League of Cities, et al. filed.

Jan 16 2015	Brief amici curiae of International Municipal Lawyers Association, et al. filed.
Feb 2 2015	SET FOR ARGUMENT ON Monday, March 23, 2015
Feb 3 2015	Record requested from U.S.C.A. 9th Circuit.
Feb 3 2015	Record from U.S.C.A. 9th Circuit is electronic and located on PACER.
Feb 6 2015	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Feb 9 2015	Brief of respondent Teresa Sheehan filed. (Distributed)
Feb 12 2015	CIRCULATED
Feb 13 2015	Brief amici curiae of American Civil Liberties Union, et al. filed. (Distributed)
Feb 17 2015	Brief amici curiae of American Psychiatric Association, et al. filed. (Distributed)
Feb 17 2015	Brief amicus curiae of Policy Council on Law Enforcement and the Mentally Ill filed. (Distributed)
Feb 17 2015	Brief amicus curiae of National Police Accountability Project filed. (Distributed)
Feb 17 2015	Brief amicus curiae of Eugene De Boise, Sr. filed. (Distributed)
Mar 9 2015	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Breyer took no part in the consideration or decision of this motion.
Mar 11 2015	Reply of petitioners City and County of San Francisco, California, et al. filed. (Distributed)
Mar 23 2015	Joint lodging proposal from counsel for petitioners and respondent.
Mar 23 2015	Argued. For petitioners: Christine VanAken, Deputy City Attorney, San Francisco, Cal.; and Ian H. Gershengorn, Deputy Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondent: Leonard Feldman, Seattle, Wash.
May 18 2015	Certiorari dismissed in part; reversed in part and remanded. Alito, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Thomas, Ginsburg, and Sotomayor, JJ., joined. Scalia, J., filed an opinion concurring in part and dissenting in part, in which Kagan, J., joined. Justice Breyer took no part in the consideration or decision of this petition.
Jun 19 2015	JUDGMENT ISSUED.

PETITION FOR WRIT OF CERTIORARI

13-1412
No.

Supreme Court, U.S.
FILED
MAY 22 2014
OFFICE OF THE CLERK

In The Supreme Court of the United States

CITY AND COUNTY OF SAN FRANCISCO, KIMBERLY REYNOLDS, and KATHRINE HOLDER,

Petitioners,

v.

TERESA SHEEHAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

SAN FRANCISCO CITY ATTORNEY'S OFFICE
DENNIS J. HERRERA
City Attorney
BLAKE P. LOEBS
PETER J. KEITH, *Counsel of Record*
CHRISTINE VAN AKEN
Deputy City Attorneys
1390 Market Street, 7th Floor
San Francisco, California 94102-5408
Telephone: (415) 554-3908
Facsimile: (415) 554-3837
E-Mail: peter.keith@sfgov.org

Counsel for Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. Whether Title II of the Americans with Disabilities Act requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody.

2. Whether it was clearly established that even where an exception to the warrant requirement applied an entry into a residence could be unreasonable under the Fourth Amendment by reason of the anticipated resistance of an armed and violent suspect within.

PARTIES TO THE PROCEEDING

Petitioners are the City and County of San Francisco, a California municipal corporation, and two individual San Francisco police officers, Kimberly Reynolds and Kathrine Holder. Petitioners were defendants-appellees in the court of appeals. Police Chief Heather Fong was a defendant-appellee in the court of appeals, but she is not a petitioner here because the judgment in her favor was affirmed by the court of appeals.

Respondent is Teresa Sheehan, an individual. Respondent was the plaintiff-appellant in the court of appeals.

TABLE OF CONTENTS

	Page
Opinions below	2
Jurisdiction	3
Relevant constitutional, statutory, and regulatory provisions	3
Statement	8
Reasons for granting the petition	18
I. This Court should resolve whether and how the Americans With Disabilities Act applies to arrests of armed and violent suspects who are disabled	18
A. The circuits are in conflict on this question	18
B. The question presented is recurring and important	22
C. Title II of the ADA does not require accommodations for armed and violent suspects who are disabled	25
II. The Court should review the Ninth Circuit's erroneous qualified immunity decision	28
A. It was not clearly established that the Fourth Amendment requires more than an exception to the warrant requirement for officers to immediately enter a residence	29

TABLE OF CONTENTS – Continued

Page

B. The Fourth Amendment does not require officers to desist from making a lawful entry and arrest of a suspect – mentally disturbed or not – by reason of the suspect's resistance 39

III. The Court should hold this petition for *Plumhoff v. Rickard* 41

Conclusion 43

Appendix:

Court of appeals opinion (Feb. 21, 2014) ..... App. 1

District court order (May 6, 2011) ..... App. 55

TABLE OF AUTHORITIES

Page

CASES:

Alexander v. City and County of San Francisco, 29 F.3d 1355 (9th Cir. 1994) 17, 33

Anderson v. Creighton, 483 U.S. 635 (1987).....29

Ashcroft v. Al-Kidd, 131 S. Ct. 2074 (2011) 29, 32, 36

Bahl v. County of Ramsey, 695 F.3d 778 (8th Cir. 2012).....21

Barnes v. Gorman, 536 U.S. 181 (2002).....24

Bates v. Chesterfield County, 216 F.3d 367 (4th Cir. 2000).....22, 39

Billington v. Smith, 292 F.3d 1177 (9th Cir. 2002).....34

Bircoll v. Miami-Dade County, 480 F.3d 1072 (11th Cir. 2007).....21

Bragdon v. Abbott, 524 U.S. 624 (1998).....25

Brigham City v. Stuart, 547 U.S. 398 (2006).....30

Buchanan v. Maine, 469 F.3d 158 (1st Cir. 2006).....36

Calef v. Gillette Co., 322 F.3d 75 (1st Cir. 2003).....26

Deorle v. Rutherford, 272 F.3d 1272 (9th Cir. 2001).....33

Elizondo v. Green, 671 F.3d 506 (5th Cir.), *cert. denied*, 133 S. Ct. 409 (2012).....36

TABLE OF AUTHORITIES – Continued

Page

Estate of Allen v. City of West Memphis, 509 F. App'x 388 (6th Cir. 2012), *cert. granted sub nom. Plumhoff v. Rickard*, 134 S. Ct. 635 (2013) 41

Estate of Bennett v. Wainwright, 548 F.3d 155 (1st Cir. 2008) 36

Fisher v. City of San Jose, 558 F.3d 1069 (9th Cir. 2009) 34, 35

Gohier v. Enright, 186 F.3d 1216 (10th Cir. 1999) 21

Graham v. Connor, 490 U.S. 386 (1989) 16, 32

Hainze v. Richards, 207 F.3d 795 (5th Cir.), *cert. denied*, 531 U.S. 959 (2000) ..... *passim*

Harris v. Serpas, 745 F.3d 767 (5th Cir. 2014) 36

Hernandez v. City of Pomona, 46 Cal. 4th 501 (2009) 35

Kentucky v. King, 131 S. Ct. 1849 (2011) 32

Menuel v. City of Atlanta, 25 F.3d 990 (11th Cir. 1994) 37

Michigan v. Tyler, 436 U.S. 499 (1978) ..... *passim*

Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658 (1978) 24

Palmer v. Circuit Court of Cook County, Ill., 117 F.3d 351 (7th Cir. 1997) 26

Pearson v. Callahan, 555 U.S. 223 (2009) 39

TABLE OF AUTHORITIES – Continued

Page

Plumhoff v. Rickard, No. 12-1117 (U.S. argued Mar. 4, 2014) 29, 41, 42

Roberts v. City of Omaha, 723 F.3d 966 (8th Cir. 2013) 20

Rockwell v. Brown, 664 F.3d 985 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 2433 (2012) 36

Ryburn v. Huff, 132 S. Ct. 987 (2012) 37, 38, 42

Sanders v. City of Minneapolis, 474 F.3d 523 (2007) 40

Saucier v. Katz, 533 U.S. 194 (2001) 32

Scott v. Harris, 550 U.S. 372 (2007) 31, 42

Seremeth v. Bd. of County Comm'rs Frederick County, 673 F.3d 333 (4th Cir. 2012) 21

Stanton v. Sims, 134 S. Ct. 3 (2013) 29, 32, 35, 38

Thompson v. Williamson County, 219 F.3d 555 (6th Cir. 2000) 21, 27

Tsombanidis v. W. Haven Fire Dep't, 352 F.3d 565 (2d Cir. 2003) 27

Tucker v. Tennessee, 539 F.3d 526 (6th Cir. 2008), *cert. denied*, 558 U.S. 816 (2009) 20, 22, 27

United States v. Echegoyen, 799 F.2d 1271 (9th Cir. 1986) 34

United States v. Kaplan, 895 F.2d 618 (9th Cir. 1990) 34

United States v. Snipe, 515 F.3d 947 (9th Cir. 2008) 30

TABLE OF AUTHORITIES – Continued

Page

Waller v. City of Danville, 556 F.3d 171 (4th Cir. 2009) 20, 27, 28

Warden, Md. Penitentiary v. Hayden, 387 U.S. 294 (1967) 31, 38

Wilson v. Layne, 526 U.S. 603 (1999) 35, 38

CONSTITUTION, STATUTES, AND REGULATIONS:

U.S. Const. Amend IV ..... *passim*

28 U.S.C. § 1254(1) 3

28 U.S.C. § 1331 11

42 U.S.C. § 1983 ..... 12, 14, 20, 24

Americans With Disabilities Act of 1991, 42 U.S.C. §§ 12101 *et seq.*:

Tit. II, 42 U.S.C. §§ 12131 *et seq.* ..... *passim*

42 U.S.C. § 12131(1)(A) 24

42 U.S.C. § 12131(2) 3, 26

42 U.S.C. § 12132 4

42 U.S.C. § 12134(a) 25

42 U.S.C. § 12205 24

Cal. Penal Code § 835a 7, 35

Cal. Welf. & Inst. Code § 5150 ..... 8, 9, 22

Del. Code Ann. tit. 11, § 464(e)(2)(c) 40

Fla. Stat. § 776.05 40

Haw. Rev. Stat. § 703-304(5)(b)(ii) 40

TABLE OF AUTHORITIES – Continued

Page

Kan. Stat. Ann. § 21-5227 40

Mo. Ann. Stat. § 563.046 40

Neb. Rev. Stat. § 28-1409(4)(b)(ii) 40

N.J. Stat. Ann. § 2C:3-4(b)(2)(b)(ii) 40

18 Pa. Cons. Stat. § 508(a)(1) 40

28 C.F.R.:

Pt. 35, §§ 35.101 *et seq.* 18

§ 35.104 .....5, 26

§ 35.130 5

§ 35.139(a) 4, 26

MISCELLANEOUS:

Tim A. Bruckner, Jangho Yoon, Timothy T. Brown & Neal Adams, *Involuntary Civil Commitments After the Implementation of California's Mental Health Services Act*, 61 Psychiatric Services 1006 (2010) 23

United States Department of Justice, *Americans with Disabilities Act Title II Technical Assistance Manual Covering State and Local Government Programs and Services* (1993) 6, 26

Amy C. Watson, Patrick W. Corrigan & Victor Ottati, *Police Responses to Persons With Mental Illness: Does the Label Matter?*, 32 J. Am. Acad. Psychiatry Law 378 (2004) 23

PETITION FOR A WRIT OF CERTIORARI

This case presents an important question concerning the reach and meaning of the Americans with Disabilities Act that has divided the circuit courts. In a case of first impression in the Ninth Circuit Court of Appeals, that court exacerbated an existing circuit conflict in holding that Title II of the Americans with Disabilities Act curbs the ability of police officers to arrest violent, mentally ill suspects. Joining the Fourth, Eighth, and Eleventh Circuits, and in conflict with the Fifth and Sixth Circuits, the Ninth Circuit held that a police officer may be required to provide accommodations to a disabled suspect in the course of arresting her, such as by delaying her arrest. Moreover, even circuits that agree with the Ninth Circuit that police may be required to make accommodations have, in practice, refused to find requested accommodations reasonable where public safety might even arguably be jeopardized. Here, the Ninth Circuit remanded for a jury's determination whether police officers should have delayed re-entering a residence to disarm and arrest a mentally ill suspect who responded to the officers' initial entry by attacking them with a knife.

In addition, the Ninth Circuit imposed a novel Fourth Amendment rule on officers entering a private home: Even when an established exception to the warrant requirement exists, the Fourth Amendment nonetheless requires that officers delay entering the residence of an armed, violent, and mentally ill suspect if that suspect can be expected to resist arrest,

unless countervailing circumstances create an "immediate need" to enter. Here, the court of appeals held that a jury could find the officers' entry into respondent's residence unreasonable because it "force[d] a confrontation" with the armed, agitated, and mentally ill respondent – and that this Fourth Amendment rule was clearly established. This holding departs from established jurisprudence and the decisions of this Court. As a result, the Ninth Circuit erred in denying qualified immunity to the two officers in this case.

Police officers regularly face erratic, dangerous behavior from suspects. They need clarity concerning their obligations under the ADA, and they need robust protection from liability where their conduct comports with clearly established law.

The City and County of San Francisco, Kimberly Reynolds, and Kathrine Holder thus respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case. This Court should grant the writ and reverse the judgment.

OPINIONS BELOW

The opinion of the court of appeals, App. 1, is reported at 743 F.3d 1211. The order of the district

court, App. 55, is unreported but available at 2011 WL 1748419.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

Provisions relevant to the first question presented.

42 U.S.C. § 12131 states in relevant part:

* * *

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12132 states:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

28 C.F.R. § 35.139 states:

> (a) This part does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others.
>
> (b) In determining whether an individual poses a direct threat to the health or safety of others, a public entity must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.

28 C.F.R. § 35.104 states in relevant part:

> § 35.104 Definitions
>
> * * *
>
> Direct threat means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services as provided in § 35.139.
>
> * * *

28 C.F.R. § 35.130 states in relevant part:

> * * *
>
> (b) * * *
>
> * * *
>
> (7) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.
>
> * * *
>
> (h) A public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities. However, the public entity must ensure that its safety requirements are based on

> actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities.

The Unites States Department of Justice's *Americans with Disabilities Act Title II Technical Assistance Manual Covering State and Local Government Programs and Services* (1993) states in relevant part:

> **II-2.8000. Qualified individual with a disability.** In order to be an individual protected by title II, the individual must be a "qualified" individual with a disability.
>
> * * *
>
> Can health and safety factors be taken into account in determining who is qualified? Yes. An individual who poses a direct threat to the health or safety of others will not be "qualified."
>
> What is a "direct threat"? A "direct threat" is a significant risk to the health or safety of others that cannot be eliminated or reduced to an acceptable level by the public entity's modification of its policies, practices, or procedures, or by the provision of auxiliary aids or services. The public entity's determination that a person poses a direct threat to the health or safety of others may not be based on generalizations or stereotypes about the effects of a particular disability.
>
> How does one determine whether a direct threat exists? The determination must be based on an individualized assessment that

> relies on current medical evidence, or on the best available objective evidence, to assess –
>
> 1) The nature, duration, and severity of the risk;
>
> 2) The probability that the potential injury will actually occur; and,
>
> 3) Whether reasonable modifications of policies, practices, or procedures will mitigate or eliminate the risk.

* * *

Provisions relevant to the second question presented.

The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

California Penal Code § 835a (West 2008) states:

> Any peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to effect the arrest, to prevent escape or to overcome resistance.
>
> A peace officer who makes or attempts to make an arrest need not retreat or desist

> from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance.

STATEMENT

1. When respondent Teresa Sheehan threatened to kill her social worker with a knife, he called the police. A dispatcher broadcast the call, advising that respondent "is known to make violent threats." The petitioner San Francisco police officers, Officer Kathrine Holder and Sergeant Kimberly Reynolds, responded. The officers met the social worker, Heath Hodge, outside respondent's home. Respondent lived in a San Francisco flat that served as a group home for mentally ill individuals living in an integrated community setting. Hodge explained that he needed assistance in detaining respondent for an involuntary psychiatric evaluation under state law. California law permits law enforcement officers or designated persons (like Hodge) to make such detentions where the person is a danger to others, a danger to himself, or "gravely disabled." Cal. Welf. & Inst. Code § 5150 (West Supp. 2014). App. 7-8.

Hodge explained what had just happened, and gave the officers more background about respondent's psychiatric history. He showed them a completed

§ 5150 detention form that summarized what he told them:

> Client has been without psychotropic meds times one and a half years. Has been presenting with increased symptoms for several weeks. Client has not been seen by the house counselor times two weeks. Housemates reported that client has been coming and going at odd hours and reportedly said she had stopped eating. It was also reported that client has been wearing the same clothing for several days. Writer conducted outreach to client and she was not responsive. Made no sound behind her closed door. Writer and property management keyed in for wellness check. Upon opening the door, client was found lying in her bed with a book over her face, eyes open and was not responsive. Addressed client several times and she did not move or answer. Client then suddenly got up, threw the covers, and yelled at writer violently, "Get out of here! You don't have a warrant! I have a knife and I'll kill you if I have to!" Client then slammed her door and locked it behind her.

Hodge checked boxes on the bottom of the form indicating that respondent was both "a danger to others" and "gravely disabled." Hodge told the officers that he had cleared the group home of other residents. He also told them that the only way out of Sheehan's bedroom other than her door was a second-story window that required a ladder. App. 8-10.

Based on this information, the officers decided to contact respondent to confirm Hodge's assessment of her condition and to take her into custody for evaluation. The officers and Hodge went into the flat and down a long hallway to reach Sheehan's room. The officers knocked on the door and told respondent they were police officers. The officers then used Hodge's key to unlock and open respondent's door. App. 10.

Respondent was lying on her bed. Immediately, she grabbed the larger of several knives from a plate next to her. Respondent came at the officers with her knife, yelling that she was going to kill them. The officers ordered respondent to put down the knife. She refused. With respondent getting closer, the officers – who did not have their weapons out – retreated, and respondent shut the door. App. 10-12.

The officers called for backup and drew their service weapons and pepper spray. Rather than wait, they decided to re-enter immediately to disarm and arrest respondent. Sergeant Reynolds explained the officers' concerns:

> With the door being closed and us not having the ability to see what she was doing, we had no way of knowing whether or not, one, she had an avenue of escape. Two, there were the possibility of other weapons that she could gain access to. And so in my opinion, as soon as that door was closed, the threat

> became more scary for us and more uncertainty about what we were dealing with.

App. 12. Reynolds deemed the entry necessary to ensure officer safety and prevent escape and potential harm to others, because respondent had "displayed obvious signs of violence and wanting to kill" the officers. *Id.*

The officers immediately started trying to kick and shoulder open respondent's door. When the door opened, respondent immediately charged at the officers with a knife while screaming that she was going to kill them. Reynolds pepper-sprayed respondent, but respondent came out the door toward Holder. Respondent was between two and four feet from Holder when Holder first fired – so close that Holder was forced to fire from the hip to prevent respondent from cutting her arm. Respondent then turned and moved toward Reynolds, and Reynolds fired two or three times at point blank range, striking respondent. Even on the ground, respondent continued to swing her knife at Holder. Holder remained cornered until a backup officer ran down the hall and finally kicked the knife out of respondent's hand. Respondent survived. App. 12-14.

2. Respondent filed suit in the United States District Court for the Northern District of California (Breyer, J.), invoking jurisdiction under 28 U.S.C. § 1331 and naming as defendants the two petitioner officers, petitioner City and County of San Francisco, and Police Chief Heather Fong. Respondent alleged

violations of the Fourth Amendment under 42 U.S.C. § 1983, violations of the "reasonable accommodation" requirement of Title II of the Americans With Disabilities Act, and state law torts. App. 15.

After discovery, petitioners and Chief Fong moved for summary judgment on all of respondent's claims. The district court granted the motion. App. 55-82. As pertinent to this petition, the district court noted the absence of Ninth Circuit authority as to whether the ADA reasonable accommodation requirement applied to situations like this one. The district court relied on the Fifth Circuit's decision in *Hainze v. Richards*, 207 F.3d 795 (5th Cir.), *cert. denied*, 531 U.S. 959 (2000), to hold that "it would be unreasonable to ask officers, in such a situation, to first determine whether their actions would comply with the ADA before protecting themselves and others." App. 79-80.

The district court also held that none of the officers' conduct violated the Fourth Amendment (thus finding no need to reach the "clearly established" prong of qualified immunity analysis). The district court held the officers' initial entry into respondent's room satisfied the emergency aid exception to the warrant requirement. App. 69-70. As to the re-entry, the district court held it was simply a continuation of the same valid search and required no separate analysis under the "continuous search" doctrine of *Michigan v. Tyler*, 436 U.S. 499, 511 (1978); and respondent's first knife attack also provided an independent legal justification for re-entering. App. 70-71.

The district court also noted that the officers "had no way of knowing whether she might escape through a back window or fire escape, whether she might hurt herself, or whether there was anyone else in her room whom she might hurt." App. 71. Finally, the district court held that the officers' deadly force was a reasonable response to respondent's second knife attack. App. 72-77.

3. The court of appeals affirmed in part and vacated in part, App. 1-48, with a partial dissent by Judge Graber as to the Fourth Amendment issues, App. 48-54.[1]

a. The court of appeals remanded respondent's ADA claim against the City and County of San Francisco for trial. App. 41-45. The court of appeals acknowledged "some disagreement among other circuits" concerning how the ADA reasonable accommodation requirement applied to arrests. App. 42-43 (reviewing decisions). The court expressly rejected the Fifth Circuit's rule stated in *Hainze* – that the reasonable accommodation requirement of the ADA simply does not apply "prior to the officer's securing the scene and ensuring that there is no threat to human life." App. 42-43 (quoting *Hainze*, 207 F.3d at 801). Having found that respondent's ADA claim was cognizable, the court of appeals held that a jury

---

[1] The court of appeals also vacated the judgment and remanded as it pertained to respondent's California law claims. Petitioners do not seek review of that ruling.

should decide whether the accommodations proposed by respondent's litigation expert were reasonable: that "the officers should have respected her comfort zone, engaged in non-threatening communications and used the passage of time to defuse the situation rather than precipitating a deadly confrontation." App. 45. A jury might find that "the situation had been defused sufficiently, following the initial retreat from Sheehan's room, to afford the officers an opportunity to wait for backup and to employ less confrontational tactics, including the accommodations that Sheehan asserts were necessary." *Id.*

b. As to the § 1983 municipal liability claims against the City and Chief Fong, the court affirmed. App. 39-41.

c. Over Judge Graber's dissent, the panel majority (Fisher, J., joined by Noonan, J.) vacated the judgment as to two of respondent's § 1983 claims against Holder and Reynolds. App. 16-39. The majority remanded for trial respondent's claims that the officers violated the Fourth Amendment (and had no qualified immunity) when they (i) re-entered respondent's room and (ii) used deadly force.

i. The full panel held that the officers' initial entry into Sheehan's room was lawful under the Fourth Amendment's emergency aid exception, given Hodge's report of respondent's condition and her threats against him. App. 20-22.

As to the officers' re-entry following respondent's first attack, the panel also held as a matter of law

that the same emergency aid exception that justified the initial entry continued to apply, and also that the "continuous search" rule under *Michigan v. Tyler* applied. App. 23-25.

That, however, did not end the majority's Fourth Amendment analysis of the officers' re-entry. Rather, the majority held that these well established legal bases to re-enter respondent's room did not, as a matter of law, permit the officers to actually do so. App. 25-32. Rather, the majority held that a second layer of reasonableness analysis is required: Officers *cannot* make an otherwise lawful entry to arrest an armed and violent mentally ill suspect if it would "force a confrontation" and there is "no immediate need to subdue [the suspect] and take [the suspect] into custody." App. 28-29. In evaluating the reasonableness of the officers' entry, the majority focused on the officers' decision to enter immediately rather than delaying or trying other tactics. App. 26 n.9.

Applying this rule to the officers' decision to enter, the majority found the "immediate need" standard was not met as a matter of law. Neither the existence of an exception to the warrant requirement, nor the need to arrest an armed and violent suspect necessarily satisfied this standard. Rather, the majority held that a jury should weigh these interests against the risk of a violent confrontation in which respondent could be injured. Further, a jury might conclude the risks of delay were minor, if it concluded respondent would not try to escape or use her weapons for anything other than defending against an

entry. The majority also allowed that "a reasonable jury could find that the officers acted reasonably by forcing the entry." App. 32. A jury might agree that "the officers had reason to fear Sheehan's escape" or "that Sheehan was not contained"; or the jury might doubt whether "the officers could have ensured their safety by retreating." The majority left it to the jury to balance the risks. App. 26-32.

On the second prong of immunity analysis, the majority held its rule – that an otherwise lawful entry must be justified by an additional "immediate need" if officers will face armed and violent resistance – was clearly established. App. 32-36. In so holding, the majority relied only on *Graham v. Connor*, 490 U.S. 386 (1989), and two Ninth Circuit decisions, none of which involved an entry under an established exception to the warrant requirement or the "continuous search" rule. App. 35.

ii. As to respondent's deadly force claim, the full panel expressly held that on the material undisputed facts, both officers' "use of deadly force – *viewed from the standpoint of the moment of the shooting* – was reasonable as a matter of law." App. 37.

Nevertheless, as with the entry claim, that did not end the Fourth Amendment analysis for the majority. Instead, the majority denied qualified immunity on the deadly force claim, on the theory that the legal cause of the need to use deadly force was the officers' possibly unlawful re-entry (as opposed to respondent's resistance). App. 37-38.

d. Judge Graber dissented from the denial of qualified immunity on the Fourth Amendment claims. App. 48-54. Judge Graber would have held that respondent could not create a Fourth Amendment question by relying on a litigation expert who criticized officers' decision to make an otherwise lawful entry as "imprudent or inappropriate." App. 50. Judge Graber also would have held that a reasonable officer could have concluded that the search was lawful under the *Michigan v. Tyler* "continuous search" rule as well as the emergency and exigent circumstances exceptions to the warrant requirement. Like the district court, Judge Graber emphasized "the need to resolve an ongoing emergency that involved a deadly weapon" and the prohibition on 20/20 hindsight. App. 52-53. As to whether the law was clearly established, Judge Graber did not find the majority's rule clearly established or that there were any clear-cut Fourth Amendment rules regarding suspects with mental illness: "In view of the extant legal principles, reasonable officers could conclude that their actions were permitted even though Plaintiff suffered from a mental illness. Police officers often interact with individuals who have a wide variety of specific needs, and there is no controlling case law that requires a different Fourth Amendment analysis for an officer on the street who faces those circumstances." App. 53. Finally, Judge Graber observed that the majority's qualified immunity analysis relied on a decision, *Alexander v. City and County of San Francisco*, 29

F.3d 1355 (9th Cir. 1994), that the Ninth Circuit had expressly limited in later decisions. App. 50.

REASONS FOR GRANTING THE PETITION

I. This Court Should Resolve Whether And How The Americans With Disabilities Act Applies To Arrests Of Armed And Violent Suspects Who Are Disabled.

A. The Circuits Are In Conflict On This Question.

The Ninth Circuit's ruling here is the only published court of appeals ruling to have ever sent to a jury a claim that law enforcement officers should have provided reasonable accommodations for an armed and violent individual. In that respect it is at odds with the decisions of every other circuit, and it exacerbates an existing division among the circuits concerning whether accommodations to disabled armed and violent suspects can ever be reasonable under Title II of the ADA, 42 U.S.C. §§ 12131 *et seq.*, and its implementing regulations, 28 C.F.R. pt. 35, §§ 35.101 *et seq.*

1. In holding that the ADA's reasonable accommodation requirement applies to officers facing violent circumstances, the Ninth Circuit adopted a rule in direct conflict with the categorical prohibition on such claims adopted by the Fifth and Sixth Circuits. Indeed, the Ninth Circuit expressly acknowledged its disagreement with the Fifth Circuit. App. 42-43.

In the Fifth Circuit, "Title II does not apply to an officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life." *Hainze*, 207 F.3d at 801. The corollary to this rule is that *after* an individual is safely in custody, the reasonable accommodation requirement does apply. *Id.* at 802. The Fifth Circuit adopted this rule in a case with similar facts and similar claims: Officers were called to respond to a mentally ill individual. The individual, Hainze, came at police officers with a knife, refused orders to drop the knife, and was shot. *Id.* at 797. Like respondent, Hainze claimed that the officers did not try to calm him down, and did not follow their training for dealing with mentally ill individuals. *Id.* at 800.

Similarly, the Sixth Circuit gives controlling weight to exigent circumstances and public safety concerns when considering whether any requested accommodation is reasonable:

> Where, as it occurred in this case, officers are presented with exigent or unexpected circumstances, it would be unreasonable to require certain accommodations be made in light of the overriding public safety concerns. [Citation omitted.] Further, we rely on and expect law enforcement officers to respond fluidly to changing situations and individuals they encounter. Imposing a stringent requirement under the ADA is inconsistent

> with that expectation, and impedes their ability to perform their duties.

Tucker v. Tennessee, 539 F.3d 526, 536 (6th Cir. 2008), *cert. denied*, 558 U.S. 816 (2009). Like this case and *Hainze*, *Tucker* involved individuals who assaulted police officers. *Tucker* held there could be no ADA reasonable accommodation claim under those circumstances.

2. The Fourth, Eighth, and Eleventh Circuits have not adopted a rule barring reasonable accommodation claims against public agencies arising from police officers' actions in the face of violent conduct or other exigent circumstances. These circuits acknowledge that accommodations for disabled arrestees may be reasonable in some circumstances. In practice, however, these circuits have never found a proposed accommodation to be reasonable where exigent circumstances even arguably existed.

In *Waller v. City of Danville*, 556 F.3d 171 (4th Cir. 2009), the Fourth Circuit rejected a reasonable accommodation claim arising from officers' two-hour standoff with an armed and violent mentally ill individual that ended in the use of deadly force. The court engaged in an extensive analysis explaining why the proposed accommodations were not reasonable as a matter of law. *Id.* at 175-77; *cf. Roberts v. City of Omaha*, 723 F.3d 966, 973 (8th Cir. 2013) (holding qualified immunity barred § 1983 claim against individual police officer premised on violation of ADA rights, because it was not clearly established

"what duties, if any, the ADA and Rehabilitation Act impose on officers who are attempting to secure a potentially violent suspect in an uncertain and rapidly evolving situation").

Even in cases involving less pressing threats to public safety, these circuits have rejected reasonable accommodation claims arising from law enforcement officers' conduct under exigent circumstances. *Seremeth v. Bd. of County Comm'rs Frederick County*, 673 F.3d 333, 339 (4th Cir. 2012) ("We find that due to the exigencies inherent in responding to a domestic violence situation, no further accommodations were required than the ones made by the deputies."); *Bahl v. County of Ramsey*, 695 F.3d 778, 784 (8th Cir. 2012) ("Even if the ADA applied to the traffic stop, we agree with the district court's conclusion that under the exigencies of the traffic stop, Bobrowski was not required to honor Bahl's request to communicate by writing."); *Bircoll v. Miami-Dade County*, 480 F.3d 1072, 1086 (11th Cir. 2007) (unreasonable to expect officer performing roadside DUI test to summon interpreter for deaf arrestee).[2]

---

[2] Although the majority cited *Gohier v. Enright*, 186 F.3d 1216 (10th Cir. 1999) in its discussion, App. 42, the Tenth Circuit has taken no position on the question presented here. *Id.* at 1222 (noting that plaintiff did not claim entitlement to accommodation). Rather, *Gohier* involved a different type of ADA claim: that officers discriminated when they responded with force to violent conduct that was caused by mental illness. The Tenth Circuit rejected that theory, *id.*, and so have other circuits. *See Thompson v. Williamson County*, 219 F.3d 555, 558

(Continued on following page)

3. This case presents a suitable vehicle to address this conflict. Certiorari was sought only twice before in the relevant cases. A petition for certiorari was filed seeking review of the Fifth Circuit's *Hainze* decision and denied – before the conflict had ripened. 531 U.S. 959 (2000). A second petition was filed seeking review of the Sixth Circuit's *Tucker* decision, but that petition did not address the same issue as presented here; instead, it concerned the culpability standard for a Title II damages claim and whether the "effectiveness" of an "auxiliary aid" is a legal or a factual question. 2009 WL 1061254. The petition was denied. 558 U.S. 816 (2009). This case provides the Court with its first opportunity to resolve this question, in a case where a public entity's potential liability turns on the answer.

B. The Question Presented Is Recurring And Important.

Police officers regularly encounter, and often detain, mentally ill individuals. In California alone, law enforcement officers and other authorized individuals make a staggering number of involuntary mental health detentions of persons who meet the § 5150 criteria. Over a seven-year period ending in July 2007, 28 California counties representing two-thirds of the state's population reported more than

---

(6th Cir. 2000); *Bates v. Chesterfield County*, 216 F.3d 367, 373 (4th Cir. 2000).

597,000 detentions of persons as a danger to themselves, a danger to others, or gravely disabled. Tim A. Bruckner, Jangho Yoon, Timothy T. Brown & Neal Adams, *Involuntary Civil Commitments After the Implementation of California's Mental Health Services Act*, 61 Psychiatric Services 1006, 1007-08 (2010) (analyzing California Dept. of Mental Health data) (available at http://psychiatryonline.org/data/Journals/PSS/3916/10ps1006.pdf (last visited May 20, 2014)). The challenges of responding to mental illness are not unique to California. Nationwide, studies indicate that 2.7 to 5.9 percent of individuals considered suspects by police have a serious mental illness. Medium and large police departments estimate that 7 percent of their contacts with the public involve persons with mental illness. Amy C. Watson, Patrick W. Corrigan & Victor Ottati, *Police Responses to Persons With Mental Illness: Does the Label Matter?*, 32 J. Am. Acad. Psychiatry Law 378, 378 (2004).

When mental illness manifests in unpredictable, violent behavior as it did in this case, officers must make split-second decisions that protect the public and themselves from harm. The dangers they face are compounded when they lack clear rules concerning what actions the law requires or forbids in responding to an armed and violent individual. The Ninth Circuit's ruling here does not establish any such rule – it provides only a "reasonableness" standard for the jury, insufficient guidance for officers in life or death situations. While the Fourth Amendment imposes a similar reasonableness standard for officers' uses of

force, Fourth Amendment analysis gives latitude for officers' decisionmaking, and refuses to impose liability for conduct that looks unreasonable only in hindsight and not in the exigencies of the moment. Under the Ninth Circuit's broad reading of the ADA's requirements, however, the reasonable accommodation analysis does not accord similar latitude.[3] Thus, this question has considerable import for police officers. Moreover, expanded ADA liability will result in municipal liability in many cases where liability for Fourth Amendment violations would not otherwise attach to the municipality. Under Title II, it is the "public entity" that is subject to liability, not its employees. 42 U.S.C. § 12131(1)(A). And municipalities may be subject to compensatory damages and fee awards when their employees do not provide reasonable accommodations. *Barnes v. Gorman*, 536 U.S. 181, 185 (2002) (damages remedy); 42 U.S.C. § 12205 (fee award). Unlike in a § 1983 action, liability under the ADA does not require proof that an unconstitutional municipal policy was the "moving force" that caused the violation. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 694 (1978).

---

[3] That is especially true because there is no qualified immunity from ADA liability. Thus, the prospect of public entity liability for ADA violations under novel interpretations of Title II is a real one – as is illustrated by this very case, where the dissenting judge agreed that San Francisco's ADA liability was a question for the jury but would have affirmed the district court's determination that the officers were entitled to qualified immunity from claims brought under section 1983. App. 48-49.

C. Title II Of The ADA Does Not Require Accommodations For Armed And Violent Suspects Who Are Disabled.

1. Congress did not intend the Americans with Disabilities Act to task public entities with accommodating disabled individuals who pose a direct threat to safety. That was the chief rationale for the Fifth Circuit's categorical bar on reasonable accommodation claims by violent individuals:

> Law enforcement personnel conducting in-the-field investigations already face the onerous task of frequently having to instantaneously identify, assess, and react to potentially life-threatening situations. To require the officers to factor in whether their actions are going to comply with the ADA, in the presence of exigent circumstances and *prior to securing the safety of themselves, other officers, and any nearby civilians, would pose an unnecessary risk to innocents*. While the purpose of the ADA is to prevent the discrimination of disabled individuals, *we do not think Congress intended that the fulfillment of that objective be attained at the expense of the safety of the general public.*

Hainze, 207 F.3d at 801 (emphasis added).

The Fifth Circuit's focus on public safety is consistent with Department of Justice regulations and guidance promulgated under 42 U.S.C. § 12134(a) – administrative constructions of the ADA that are entitled to deference. *Bragdon v. Abbott*, 524 U.S. 624,

646 (1998). The Department of Justice construes the word "qualified" in 42 U.S.C. § 12131(2) to exclude any individual who poses a "direct threat" to the health or safety of others, because such persons are not "qualified" to participate in public programs or services. United States Department of Justice, *Americans with Disabilities Act Title II Technical Assistance Manual Covering State and Local Government Programs and Services*, at II-2.8000 (1993). Title II "does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others." 28 C.F.R. § 35.139(a). A "direct threat" means "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services as provided in § 35.139." 28 C.F.R. § 35.104. These Department of Justice regulations construing Title II simply state what has long been the rule in the Title I employment context: a person who threatens other people is not "qualified" under the ADA, even when that behavior is caused by a disability. *See Calef v. Gillette Co.*, 322 F.3d 75, 87 (1st Cir. 2003); *Palmer v. Circuit Court of Cook County, Ill.*, 117 F.3d 351, 352 (7th Cir. 1997).

Respondent's behavior here – threatening Hodge and the officers, and then charging the officers with a knife – plainly met the definition of a "direct threat." The significant risk respondent posed could not be "eliminated," because she refused to drop her knife

and to cooperate in a peaceable detention. Respondent was not "qualified" under Title II due to her ongoing violent behavior. *Cf. Thompson v. Williamson County*, 219 F.3d 555, 558 (6th Cir. 2000) (explaining that deputy sheriff could not provide ADA "services" to the disabled decedent without first disarming him).

2. Even if an armed and violent individual were "qualified" within the meaning of Title II, it is not reasonable to expect public employees to consider and provide accommodations for violent individuals. *Tucker*, 539 F.3d at 536. Standoffs with violent individuals are "unstable" and officers are "operating under the pressure of time from the start." *Waller*, 556 F.3d at 175. In contrast, a typical ADA reasonable accommodation claim against an entity involves someone who will actually communicate with public employees about accommodations – not someone who poses a deadly threat to them. *E.g.*, *Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 579 (2d Cir. 2003) ("[A] plaintiff must first use the procedures available to notify the governmental entity that it seeks an exception or variance from the facially neutral laws when pursuing a reasonable accommodation claim.").

Moreover, when officers are dealing with irrational, unstable, and violent individuals, it is difficult to identify any particular accommodation as "reasonable," because no one knows what will work. By contrast, it is far more straightforward to determine that an interpreter can assist a deaf arrestee, or that a van can be used to transport an arrestee who uses a wheelchair – provided each is cooperative. But with

an irrational and uncooperative individual, there is no guarantee that any particular accommodation will work. Under those circumstances, proposing "reasonable accommodations" after the fact becomes an exercise in 20/20 hindsight, where "there was always something more or different that could have been done." *Waller*, 556 F.3d at 176.

II. The Court Should Review The Ninth Circuit's Erroneous Qualified Immunity Decision.

Under the majority's new Fourth Amendment rule, an officer making a decision whether to enter a residence can no longer rely on the existence of an established exception to the warrant requirement, or the *Michigan v. Tyler* "continuous search" rule. Rather, in cases involving armed and violent suspects who are mentally ill, an officer cannot enter *even under an established exception to the warrant requirement* when it would "force a confrontation" and there is "no immediate need to subdue [the suspect] and take [the suspect] into custody." App. 29. And a jury conducts this balancing test.

Whatever the merits of this rule, one thing can be said with certainty: it was not clearly established in 2008, when petitioners relied on established exceptions to the warrant requirement and the "continuous search" rule to re-enter respondent's room. The 2-1 majority wrongly held otherwise only because it departed from this Court's fundamental principles of

qualified immunity analysis. That error is so clear that the Court should summarily reverse, as it has in past decisions. Alternatively, the court could grant review on the merits, or hold this petition for consideration in light of *Plumhoff v. Rickard*, No. 12-1117 (U.S. argued Mar. 4, 2014), another case presenting questions about whether a Fourth Amendment rule was clearly established.

A. It Was Not Clearly Established That The Fourth Amendment Requires More Than An Exception To The Warrant Requirement For Officers To Immediately Enter A Residence.

The law is clearly established only when "every reasonable official would have understood that what he is doing violates that right." *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2083 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) (internal quotation marks omitted). The law and its application to the specific situation must be so clear-cut that it is "beyond debate" that the action would violate the Constitution. *Id.* Liability is reserved for actions that only a "plainly incompetent" official could have considered lawful in light of existing precedent. *Stanton v. Sims*, 134 S. Ct. 3, 5 (2013) (per curiam). The majority disregarded these essential principles and erred in finding the law was clearly established here.

1. None of this Court's past rulings clearly established that officers acting under an established

exception to the warrant requirement must delay making an entry into a residence, based on the expected armed resistance of a suspect within – mentally ill or otherwise.

In imposing that duty here, the majority relied on *Brigham City v. Stuart*, 547 U.S. 398, 406 (2006), which stated that the "manner of entry" during an emergency search must be reasonable. App. 18. But in that regard, *Stuart* did not require anything other than compliance with "the Fourth Amendment's knock-and-announce rule," *id.* at 407 – and the petitioners did that here, as the majority held, App. 22.[4] And no other decision of this Court has imposed a rule that when an established exception to the warrant requirement applies, officers may need to delay or desist from entering for *any* reason, let alone the reasons cited by the majority here.

And no decision of this Court has indicated that the "continuous search" rule of *Michigan v. Tyler* – which the majority found applicable here, App. 24 – is subject to the limitations imposed by the majority's ruling. As the dissent concluded, a reasonable officer could conclude that the "continuous search" rule applied. App. 52.

---

[4] Similarly, the Ninth Circuit decision cited by the majority for the "manner of entry" requirement also construed this to mean compliance with the knock-and-announce rule. App. 18; *United States v. Snipe*, 515 F.3d 947, 954 (9th Cir. 2008).

Indeed, several of this Court's decisions could be read to foreclose the majority's new rule that officers must refrain from a lawful entry based on a suspect's anticipated armed resistance unless there is an "immediate need" to enter. Most significantly, this Court has already held that when a resisting individual in a residence has access to weapons, that is an exigency that *in and of itself proves an immediate need to enter* – not to delay, as the majority's rule requires. "Speed here was essential, and only a thorough search of the house for persons and weapons could have insured that Hayden was the only man present and that the police had control of all weapons which could be used against them or to effect an escape." *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 299 (1967). This Court has also, in other contexts, rejected a rule requiring an officer to relent based on a suspect's resistance to a lawful arrest. In *Scott v. Harris*, 550 U.S. 372, 385 (2007), this Court rejected an argument that a suspect could use his own dangerous resistance as a shield against officers' otherwise lawful efforts to make an arrest. "The Constitution assuredly does not impose this invitation to impunity-earned-by-recklessness." *Id.* at 385. And as to the majority's requirement that officers base the timing of their entry on a prediction whether the suspect within will engage in violence, this Court has recognized that a Fourth Amendment test that requires officers to predict a lawless response to their lawful conduct – like the majority's – "would create unacceptable and unwarranted difficulties for law enforcement officers who must make quick decisions in the field" as well

as for any factfinder attempting to judge that prediction in hindsight. *Kentucky v. King*, 131 S. Ct. 1849, 1860 (2011) (officers may attempt to knock-and-talk without needing to predict whether that will prompt destruction of evidence). As the dissent stated, a reasonable officer could conclude that an established exception to the warrant requirement was enough to satisfy the Fourth Amendment. App. 50-51.

2. This Court has "repeatedly told courts – and the Ninth Circuit in particular – not to define clearly established law at a high level of generality" in conducting qualified-immunity analysis. *Al-Kidd*, 131 S. Ct. at 2084. A court of appeals cannot find clearly established law from "equivocal" statements in this Court's past decisions or its own distinguishable precedents. *Stanton*, 134 S. Ct. at 7.

Here, none of the three cases relied on by the majority in its qualified immunity analysis, App. 35, clearly established that the officers could not rely on an established exception to the warrant requirement or the "continuous search" rule, and immediately reenter respondent's room.

The first case cited by the majority was *Graham v. Connor* But *Graham* held simply that the Fourth Amendment reasonableness standard applies to the force used to make a search or seizure. Nevertheless, just like it did in *Saucier v. Katz*, 533 U.S. 194 (2001), the Ninth Circuit erroneously treated *Graham* as establishing "the legal constraints on [the] particular police conduct" at issue here. *Id.* at 205.

The second case cited by the majority, *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001), was a Fourth Amendment force case holding that officers cannot use a beanbag shotgun against a mentally disturbed person who is unarmed, poses no threat, and had assaulted no one. *Id.* at 1285. *Deorle* stated nothing about entries, and its facts are a far cry from this case.

Third, the decision in *Alexander v. City and County of San Francisco*, 29 F.3d 1355 (9th Cir. 1994), did not clearly establish the majority's rule. Like this case, *Alexander* involved Fourth Amendment entry and force claims premised on officers' decision not to wait before entering the home of an armed mentally ill person. The court held that a jury should determine factual disputes affecting the legality of the officers' entry and the reasonableness of the force used to make the entry. *Id.* at 1366-67. But *Alexander* is readily distinguishable: petitioners here, unlike the officers in *Alexander*, were indisputably entering under an established exception to the warrant requirement. *Cf. Alexander*, 29 F.3d at 1361 ("Without an arrest warrant, *and without exigent circumstances*, the police had no right to enter Quade's house for the primary purpose of arresting him. The inspection warrant was just that: an inspection warrant.") (emphasis added).[5] Indeed, as the dissenting judge noted,

---

[5] The majority disregarded this holding in *Alexander*; the majority incorrectly stated that the "police officers had a legal

(Continued on following page)

App. 50-51, the Ninth Circuit subsequently limited *Alexander* to its facts, holding that so long as an entry satisfies an exception to the warrant requirement, it does not violate the Fourth Amendment even if it is "imprudent" or "inappropriate" or even "reckless." *Billington v. Smith*, 292 F.3d 1177, 1188-90 (9th Cir. 2002). Given these "important limitations on *Alexander*," *Billington*, 292 F.3d at 1188, it was not beyond debate in 2008 that petitioners could not proceed under an established exception to the warrant requirement. App. 49-51 (dissent).

None of these three decisions had anything to do with the "continuous search" rule of *Michigan v. Tyler*. And none of the other "continuous search" decisions cited by the majority – before or after 2008 – clearly established the rule the majority imposed on petitioners. App. 24; *Fisher v. City of San Jose*, 558 F.3d 1069 (9th Cir. 2009) (en banc); *United States v. Kaplan*, 895 F.2d 618, 623 (9th Cir. 1990); *United States v. Echegoyen*, 799 F.2d 1271, 1280 (9th Cir. 1986). Indeed, language in the Ninth Circuit's 2009 en banc decision in *Fisher v. City of San Jose* rejected the very premise of the majority's rule – that an armed, violent suspect can keep officers at bay and thereby avoid application of the "continuous search" rule: "We reject the notion that trained officers, who put themselves in harm's way when handling a dangerous armed standoff, essentially increase the constitutional

---

right to enter . . . to execute an administrative warrant in *Alexander*." App. 35.

rights of suspects who, by their actions, both provoke and prolong the need for continuing police action." *Fisher*, 558 F.3d at 1080. Where a 2014 panel majority embraced a notion that an en banc court expressly rejected in 2009, the majority's rule could not have been clearly established for police officers in 2008. *Wilson v. Layne*, 526 U.S. 603, 618 (1999) ("If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.").

3. Moreover, in the qualified immunity analysis, officers are entitled to rely on existing state law that authorizes their conduct. *Stanton*, 134 S. Ct. at 7. Contrary to the majority's rule, California law provides that officers with probable cause to make an arrest have no duty to delay in order to avoid a conflict. Section 835a of the California Penal Code provides that an officer with probable cause to make an arrest "need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested." In 2009, California's highest court explained this long-established principle of state law: "Long ago, we explained that an officer with probable cause to make an arrest is not bound to put off the arrest until a more favorable time and is under no obligation to retire in order to avoid a conflict. Instead, an officer may press forward and make the arrest, using all the force reasonably necessary to accomplish that purpose." *Hernandez v. City of Pomona*, 46 Cal. 4th 501, 518 (2009) (internal quotation marks, brackets, and citations omitted).

Probable cause existed to arrest respondent based on threats to the officers and Hodge, and based on her initial knife attack. App. 25 n.8, 29. Thus, under this law, it cannot be said that only a plainly incompetent officer could conclude that petitioners had lawful authority to persist in arresting respondent.

4. "Absent controlling authority," "a robust consensus of cases of persuasive authority" was necessary to clearly establish the law. *Al-Kidd*, 131 S. Ct. at 2084. And there is no such consensus in support of the majority's rule here. To the contrary, published decisions in the First, Fifth, and Eleventh Circuits found no Fourth Amendment liability in similar situations where officers made an entry (or re-entry) to arrest an armed and violent individual who was mentally disturbed, and ended up using deadly force. Unlike the majority's decision here, each of these decisions confined the Fourth Amendment entry inquiry to whether an exception to the warrant requirement applied. None of these other circuits' decisions held that a Fourth Amendment violation could arise from a finding that it was unwise for officers to enter, given the likelihood that they could end up needing to use deadly force against an armed and violent mentally ill person. *See Harris v. Serpas*, 745 F.3d 767, 773 (5th Cir. 2014); *Elizondo v. Green*, 671 F.3d 506, 508 (5th Cir.), *cert. denied*, 133 S. Ct. 409 (2012); *Rockwell v. Brown*, 664 F.3d 985, 991 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 2433 (2012); *Estate of Bennett v. Wainwright*, 548 F.3d 155, 170, 174-75 (1st Cir. 2008); *Buchanan v. Maine*, 469 F.3d 158, 169-70

(1st Cir. 2006); *Menuel v. City of Atlanta*, 25 F.3d 990, 996 (11th Cir. 1994).

5. Finally, even assuming that the Fourth Amendment required a finding of an "immediate need" to enter – beyond the finding of immediate need implicit in a determination that an exception to the warrant requirement applies – a reasonable officer could have concluded here that such an immediate need existed.

The majority in this case disregarded the principle that qualified immunity permits a broad range of judgments to officers on the scene – especially when it comes to evaluating risks to officer safety and public safety. In that regard, the majority committed the same error as in *Ryburn v. Huff*, 132 S. Ct. 987 (2012) (per curiam). In *Ryburn*, this Court summarily reversed the Ninth Circuit's denial of qualified immunity to officers who made an entry based on "officer safety" concerns. *Id.* at 989. The Ninth Circuit, "far removed from the scene and with the opportunity to dissect the elements of the situation," failed to follow the principle that "judges should be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation." *Id.* at 991-92. Under the properly applied qualified immunity standard, an officer's assessment that a risk exists on a given set of facts is permissible if "a reasonable officer *could have* come to such a conclusion based on the facts." *Id.* at 992 (emphasis added).

Under the *Ryburn* standard, the majority here should have recognized qualified immunity. There was a plausible basis for the officers to conclude that the need to disarm a violent and irrational person posed a risk justifying immediate action. *Hayden*, 387 U.S. at 299 (holding exigency existed, where "speed" was "essential" to ensure "that the police had control of all weapons which could be used against them or to effect an escape"). Both the dissenting judge and the district court so found. App. 49, 71. Indeed, even the majority allowed that a reasonable jury could *agree* with the officers that immediate action was necessary on the facts most favorable to respondent. App. 32. Where reasonable minds can differ, qualified immunity applies. *Wilson*, 526 U.S. at 618.

6. This Court has summarily reversed Ninth Circuit denials of qualified immunity twice in the past three years – in *Stanton v. Sims* and *Ryburn v. Huff*. Like this case, both of those decisions involved whether officers could rely on established exceptions to the warrant requirement. This Court found the Ninth Circuit's decisions to strip officers of immunity "troubling," *Stanton*, 134 S. Ct. at 7, and "flawed for numerous reasons," *Ryburn*, 132 S. Ct. at 991. The same is true here. Summary reversal is warranted.

B. The Fourth Amendment Does Not Require Officers To Desist From Making A Lawful Entry And Arrest Of A Suspect – Mentally Disturbed Or Not – By Reason Of The Suspect's Resistance.

Because the majority plainly erred at the second prong of immunity analysis in concluding its rule was clearly established, the Court need not reach the first-prong qualified immunity question: whether the majority's rule correctly construed the Fourth Amendment. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Nevertheless, the majority's rule is wrong on this important question of federal law.

1. As already noted above, *supra* section II.A.1., the majority's rule is inconsistent with this Court's past decisions. The Fourth Amendment does not require officers to desist from making an otherwise lawful entry to arrest an armed and violent suspect.

And there cannot be a different rule where mental illness is concerned. The majority's rule overlooks that dangerous criminal behavior and mental illness can exist side-by-side, as happened here. When a mentally disturbed individual is presently armed and violent, the balance must favor officer safety and public safety. *Bates v. Chesterfield County*, 216 F.3d 367, 372 (4th Cir. 2000) ("Knowledge of a person's disability simply cannot foreclose officers from protecting themselves, the disabled person, and the general public when faced with threatening conduct by the disabled individual."). A knife attack on an officer or a

civilian is no less deadly, just because the person wielding the knife has been diagnosed with mental illness. *Sanders v. City of Minneapolis*, 474 F.3d 523, 527 (2007). The majority's rule will induce hesitancy and delay during these emergency situations, by forcing officers to ascertain the *causes* of dangerous behavior instead of dealing with its *effects*. It is tragic that mental illness can sometimes be a cause of violent behavior. But it is no solution to blame the police officer whose duty it is to respond.

2. The majority's rule also conflicts with the statutes of several states – not just California's – which expressly authorize officers to press forward and make an arrest in the face of resistance. *See, e.g.*, Del. Code Ann. tit. 11, § 464(e)(2)(c) (West, Westlaw through 79 Laws 2014, ch. 214); Fla. Stat. § 776.05 (West, Westlaw through Mar. 31, 2014); Haw. Rev. Stat. § 703-304(5)(b)(ii) (West, Westlaw through 2014 Act 17); Kan. Stat. Ann. § 21-5227 (West, Westlaw through 2013 Reg. & Spec. Sess.); Mo. Ann. Stat. § 563.046 (West, Westlaw through Feb. 19, 2014); Neb. Rev. Stat. § 28-1409(4)(b)(ii) (West, Westlaw through 2013 Reg. Sess.); N.J. Stat. Ann. § 2C:3-4(b)(2)(b)(ii) (West, Westlaw through L.2014, c.2 & J.R. No. 1); 18 Pa. Cons. Stat. § 508(a)(1) (West, Westlaw through 2014 Reg. Sess. Acts 1-21, 23-36, 38-40).

3. Finally, this Fourth Amendment issue will recur, as surely as the ADA issues discussed above. *Supra* section I.B.

III. The Court Should Hold This Petition For *Plumhoff v. Rickard*.

This case concerns a denial of qualified immunity from a Fourth Amendment claim, just like another case pending in this Court: *Plumhoff v. Rickard*, No. 12-1117 (U.S. argued Mar. 4, 2014). The two cases have much in common, and the outcome of *Plumhoff* may well control this case.

1. Just like the majority here, the court of appeals in *Plumhoff* identified no controlling authority that clearly established a rule prohibiting the officers' challenged conduct in the specific situation they faced. *Estate of Allen v. City of West Memphis*, 509 F. App'x 388, 392 (6th Cir. 2012), *cert. granted sub nom. Plumhoff v. Rickard*, 134 S. Ct. 635 (2013).

2. The similarities, however, are not limited to a circuit court's treatment of general qualified immunity principles. The two cases involve similar specific decisions by police officers: to seize a suspect and to use deadly force to do so, based on the risk of danger to officers and the public so long as the suspect remained out of police custody. In each case, the suspect had been engaged in dangerous conduct moments before – the *Plumhoff* decedent's reckless vehicular flight, 509 F. App'x at 389, and respondent's knife assault.

Under these similar circumstances, the courts of appeals denied immunity for similar reasons. Each court held that police officers could be found at fault for taking action when a suspect appeared to be

momentarily cornered – but still refused to submit or to relinquish a dangerous instrument. 509 F. App'x at 392 ("In our case, the fleeing vehicle was essentially stopped and surrounded by police officers and police cars although some effort to elude capture was still being made."). In both cases, the denial of immunity imposed the specter of liability for officers who did not "cease[] their pursuit" and "hope[] for the best," *Scott*, 550 U.S. at 385.

3. Both cases also involve the question of what range of judgments qualified immunity permits officers to make about public safety risks and officer safety risks in the midst of a dangerous confrontation. If the correct rule is that qualified immunity applies where reasonable minds can differ regarding issues of risk assessment – as this Court's decisions strongly suggest, *e.g.*, *Ryburn*, 132 S. Ct. at 992 – then that principle may be dispositive in *Plumhoff* as well as here. Indeed, in both cases, *parties other than the officers* frankly acknowledged that reasonable minds could differ as to whether the officers acted reasonably. The respondent in *Plumhoff* stated "reasonable minds could differ on the issue of the Petitioners' objective reasonableness." Resp. Brief at 25, *Plumhoff v. Rickard*, No. 12-1117 (filed Jan. 29, 2014). Similarly, the majority here acknowledged that a reasonable jury could agree with the officers' risk assessment. App. 32. In both cases, that is a good reason to recognize qualified immunity, not deny it.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

SAN FRANCISCO CITY
ATTORNEY'S OFFICE
DENNIS J. HERRERA
City Attorney
BLAKE P. LOEBS
PETER J. KEITH, *Counsel of Record*
CHRISTINE VAN AKEN
Deputy City Attorneys

Counsel for Petitioners

May 22, 2014

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TERESA SHEEHAN, *Plaintiff-Appellant*, v. CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation; HEATHER FONG, in her capacity as Chief of Police for the City and County of San Francisco; KIMBERLY REYNOLDS, individually, and in her capacity as police officer for the City and County of San Francisco; KATHERINE HOLDER, individually, and in her capacity as police officer for the City and County of San Francisco, *Defendants-Appellees.*	No. 11-16401 D.C. No. 3:09-cv-03889-CRB OPINION

Appeal from the United States District Court
for the Northern District of California
Charles R. Breyer, District Judge, Presiding

Argued and Submitted
January 16, 2013 – San Francisco, California

Filed February 21, 2014

Before: John T. Noonan, Susan P Graber and
Raymond C. Fisher, Circuit Judges.

Opinion by Judge Fisher;
Partial Concurrence and Partial Dissent
by Judge Graber

COUNSEL

John L. Burris and Benjamin Nisenbaum (argued), Law Offices of John L. Burris, Oakland, California, for Plaintiff-Appellant.

Dennis J. Herrera, City Attorney, Joanne Hoeper, Chief Trial Deputy, Blake P. Loebs and Peter J. Keith (argued), Deputy City Attorneys, San Francisco, California, for Defendants-Appellees.

OPINION

FISHER, Circuit Judge:

This case involves a near fatal tragedy in which police officers attempted to help a mentally ill woman who needed medical evaluation and treatment but wound up shooting and nearly killing her instead. They did so after entering her home without a warrant, causing her to react with violent outrage at the intruders. Fundamentally at issue is the constitutional balance between a person's right to be left alone in the sanctity of her home and the laudable efforts of the police to render emergency assistance, but in a way that does not turn the intended beneficiary into a victim or a criminal.

Teresa Sheehan, a woman in her mid-50s suffering from a mental illness, lived in a San Francisco

group home that accommodated such persons. Her assigned social worker, Heath Hodge, became concerned about her apparently deteriorating condition and summoned the police for help in transporting her to a mental health facility for a 72-hour involuntary commitment for evaluation and treatment under California Welfare & Institutions Code § 5150. Hodge deemed Sheehan "gravely disabled," because she was not taking her medication or taking care of herself, and a danger to others, because she had threatened him when he attempted to perform a welfare check on her. When San Francisco police officers Kimberly Reynolds and Katherine Holder arrived on the scene, they entered Sheehan's room, without a warrant, to confirm Hodge's assessment and take her into custody. Sheehan reacted violently to the officers' presence, grabbing a knife, threatening to kill the officers, telling the officers that she did not wish to be detained in a mental health facility and forcing the officers to retreat to the hallway, outside Sheehan's closed door, for their safety. The officers called for backup, but rather than waiting for backup or taking other actions to maintain the status quo or de-escalate the situation, the officers drew their weapons and forced their way back into Sheehan's room, presumably to disarm, subdue and arrest her, and to prevent her escape (although there do not appear to have been any means of escape available). Sheehan once again threatened the officers with a knife, causing the officers to shoot Sheehan five or six times. Sheehan, who survived, filed this 42 U.S.C. § 1983 action against the officers and the city, asserting

violations of her rights under the Fourth Amendment and the Americans with Disabilities Act, as well as tort and statutory claims under state law. The district court granted summary judgment to the defendants, and Sheehan appealed.

Although a warrantless search or seizure in a person's home is presumptively unreasonable under the Fourth Amendment, our case law recognizes exceptions to the warrant requirement to render emergency assistance or respond to exigent circumstances. We hold that the officers were justified in entering Sheehan's home *initially* under the emergency aid exception because they had an objectively reasonable basis to believe that Sheehan was in need of emergency medical assistance and they conducted the search or seizure in a reasonable manner up to that point. Officers conducting a welfare search, where the objective is rescue, are expected to err on the side of caution, and under the circumstances of this case the officers reasonably could have believed that Sheehan's situation presented a genuine emergency and that entering as they did was a reasonable means of providing her with assistance.

We nonetheless hold that there are triable issues of fact as to whether the *second entry* violated the Fourth Amendment. If the officers were acting pursuant to the emergency aid exception, then they were required to carry out the search or seizure in a reasonable manner. Similarly, if they were acting pursuant to the exigent circumstances exception, they were required to use reasonable force. Under either

standard, a jury could find that the officers acted unreasonably by forcing the second entry and provoking a near-fatal confrontation. We therefore cannot say that the second entry was reasonable as a matter of law.

We further hold that there are triable issues of fact as to whether the officers used excessive force by resorting to deadly force and shooting Sheehan. The shooting was lawful when viewed from the moment of the shooting because at that point Sheehan presented an immediate danger to the officers' safety. Under our case law, however, officers may be held liable for an otherwise lawful defensive use of deadly force when they intentionally or recklessly provoke a violent confrontation by actions that rise to the level of an independent Fourth Amendment violation. *See Billington v. Smith,* 292 F.3d 1177, 1189 (9th Cir. 2002). Here, Sheehan has presented a triable issue as to whether the officers committed an independent Fourth Amendment violation by unreasonably forcing their way back into her home, and she has also presented evidence from which a reasonable jury could find that the officers acted recklessly in doing so. She has therefore presented a triable issue of the unreasonable use of deadly force under *Billington*'s provocation theory.

We hold that the district court properly rejected Sheehan's claims of municipal liability under *Monell v. Department of Social Services of the City of New York,* 436 U.S. 658 (1978). Sheehan's claim that the city is liable on a failure to train theory fails because

she concedes that the police department employed appropriate training materials to guide police officers' responses to persons they knew to be suffering from mental illness. That the officers may not have followed those policies does not establish that the city was deliberately indifferent to Sheehan's rights. Sheehan's claim that the city is liable for ratifying the officers' allegedly unconstitutional acts fails because there is no evidence that the city adopted or expressly approved the officers' actions.

Turning to an issue of first impression, we join the majority of circuits that have addressed the issue and hold that Title II of the Americans with Disabilities Act applies to arrests. But we emphasize, as have those other circuits, that the exigencies surrounding police officers' decisions in the field must be taken into account when assessing the reasonableness of the officers' actions. We hold that, on the facts presented here, there is a triable issue whether the officers failed to reasonably accommodate Sheehan's disability when they forced their way back into her room without taking her mental illness into account or employing generally accepted police practices for peaceably resolving a confrontation with a person with mental illness.

Finally, we vacate summary judgment on Sheehan's state law claims and remand for further proceedings.

BACKGROUND

Teresa Sheehan was a resident of Conrad House [sic], a group home for persons dealing with mental illness located in San Francisco. Residents of the home have private rooms and share common areas, like the kitchen and living room. On August 7, 2008, Heath Hodge, a social worker, attempted to perform a welfare check on Sheehan. When he entered Sheehan's room without her permission, Sheehan told him to get out. She also told him that she had a knife and threatened him.

In light of Sheehan's threat, Hodge cleared the building of other residents. He also completed an application under California Welfare & Institutions Code § 5150 for Sheehan's 72-hour detention for psychiatric evaluation and treatment. He telephoned the police department's nonemergency number and requested police assistance in transporting Sheehan to a mental health facility.

Section 5150 provides a mechanism for mental health professionals or others to initiate a temporary detention of persons who are a danger to themselves or others or "gravely disabled." Section 5150 states in pertinent part:

> When any person, as a result of mental disorder, is a danger to others, or to himself or herself, or gravely disabled, a peace officer, member of the attending staff, as defined by regulation, of an evaluation facility designated by the county, or other professional

> person designated by the county may, upon probable cause, take, or cause to be taken, the person into custody and place him or her in a facility designated by the county and approved by the State Department of Health Care Services as a facility for 72-hour treatment and evaluation.

Cal. Welf. & Inst. Code § 5150(a). The statute defines "gravely disabled" as, inter alia, "[a] condition in which a person, as a result of a mental disorder, is unable to provide for his or her basic personal needs for food, clothing, or shelter." *Id.* § 5008(h)(1).

The San Francisco Police Department dispatched Officer Katherine Holder and Sergeant Kimberly Reynolds to respond to Hodge's call for assistance. The computer automated dispatch information provided to the officers stated: "Social worker just went inside to check on his patient, subject is known to make violent threats, told reporting party to get out or she'll knife him (no weapon seen) //Name is Teresa Sheehan/Eurasian, early 50's, wearing striped shirt/pants."

Officer Holder and Sergeant Reynolds met Hodge outside the group home. Hodge showed the officers a card issued by the city identifying him as a person authorized to initiate a 72-hour detention under § 5150. Hodge advised the officers of his reason for the call. He explained that he had gone into Sheehan's room to check on her and that Sheehan had threatened to kill him with a knife. He explained that Sheehan had been off her medication for a

matter of months and that she had not been taking care of herself. Hodge also informed the officers that he had cleared the building of other residents and that the only way out of Sheehan's room, other than the main door to the second floor hallway, was a second floor window that could not be used as a means of egress without a ladder.[1]

Hodge also showed the officers the § 5150 application he had completed before their arrival. The application said:

> Client has been without psychotropic meds times one and a half years. Has been presenting with increased symptoms for several weeks. Client has not been seen by the house counselor times two weeks. Housemates reported that client has been coming and going at odd hours and reportedly said she had stopped eating. It was also reported that client has been wearing the same clothing for several days. Writer conducted outreach to client and she was not responsive. Made no sound behind her closed door. Writer and property management keyed in for wellness check. Upon opening the door, client was found lying in her bed with a book over her face, eyes open and was not responsive.

---

[1] Whether Hodge told the officers that no one else was in the building appears to be disputed, but for purposes of evaluating the defendants' motion for summary judgment we view the evidence in the light most favorable to Sheehan, the nonmoving party.

> Addressed client several times and she did not move or answer. Client then suddenly got up, threw the covers, and yelled at writer violently, "Get out of here! You don't have a warrant! I have a knife and I'll kill you if I have to!" Client then slammed her door and locked it behind her.

Near the bottom of the application form, Hodge checked two boxes, one to indicate that Sheehan was a danger to others and one to indicate that she was gravely disabled. Hodge did not check the box to indicate that Sheehan was a danger to herself, nor did he give the officers any other reason to believe Sheehan was suicidal or likely to injure herself.

Based on the information furnished by Hodge, the officers decided to contact Sheehan to confirm Hodge's assessment and take Sheehan into custody. Sheehan's room was located at the end of a hallway on the second floor. As the officers faced Sheehan's closed door, there was a closed door to the right and a small alcove, also containing closed doors, to the left.

When they reached Sheehan's door, the officers, accompanied by Hodge, knocked on the door and announced that they were police officers. They used a key that Hodge had given them and opened the door. When the door opened, the officers saw Sheehan lying on her bed with a book on her chest or stomach.

What happened next is mostly, though not entirely, undisputed. In Sergeant Reynolds' telling, Sheehan "raised up, reached over with her left hand

very quickly grabbed one of the knives, a larger knife, from the plate and immediately walked in an aggressive threatening manner towards us saying, get out of here. I'm going to kill you. Get out of my room. I don't need your help. Stuff like that, and was repeating it over and over and over again." The "knife was shoved out in front of her, blade pointed towards us. She had her hand on the handle, and as she approached closer to us the knife was always in front of her and there was some moving going on, like a jabbing motion or a stabbing motion." In Officer Holder's telling, Sheehan "grabbed the knife" and "raised it above her head coming towards Sergeant Reynold and me saying I'm going to kill you." Hodge confirmed that Sheehan held a knife in her hands and said several times that she would kill the officers if they came near her. Although Sheehan's version of events departs in certain respects from those of the other three witnesses, Sheehan concedes that she held a knife and threatened to kill the officers.[2] Sheehan testified that she told the officers that they didn't have a search warrant and that they needed to subpoena her

---

[2] Sheehan's appellate briefs acknowledge that her deposition testimony was conflicting and inconsistent. Her briefs state that "there were obvious gaping inconsistencies in her testimony," and that her "testimony also smacks of irrationality that begs the question whether any of it is credible." They say that "the inherent inconsistencies in her testimony cast suspicion over all of it." With respect to some events, in fact, Sheehan's briefs adopt the officers' version of events rather than Sheehan's own.

if they wanted to talk to her. She testified that she told the officers to go away and leave her alone.

This encounter ended when the officers retreated and Sheehan closed the door, leaving Sheehan in her room and the officers and Hodge in the hallway. The officers responded to this situation by calling for backup, drawing their service weapons and directing Hodge to go downstairs to let in additional officers who would be responding to the call for backup. Rather than waiting for backup to arrive, however, the officers decided to forcibly reenter Sheehan's room. As Sergeant Reynolds later explained:

> With the door being closed and us not having the ability to see what she was doing, we had no way of knowing whether or not, one, she had an avenue of escape. Two, there were the possibility of other weapons that she could gain access to. And so in my opinion, as soon as that door was closed, the threat became more scary for us and more uncertainty about what we were dealing with.

Because Sheehan had "displayed obvious signs of violence and wanting to kill" the officers, Reynolds deemed the entry necessary to ensure officer safety and to prevent Sheehan from escaping (and becoming a threat to others). Consequently, Reynolds directed Holder to attempt to force the door open. Reynolds acknowledges that she did not take Sheehan's mental illness into account when she decided to force the second entry. As Holder used her feet and shoulders to attempt to gain entry, Reynolds stood behind Holder

with her pepper spray in one hand and her service weapon in the other. Holder also had her service weapon out. The door opened.[3]

What happened next is subject to some dispute. Under the officers' account, Sheehan emerged from the room brandishing a knife and advanced on the officers. Reynolds pepper sprayed Sheehan, but without effect. When Sheehan continued to advance, Holder, and then Reynolds, fired their weapons, hitting Sheehan five or six times. Sheehan fell to the ground, but continued to swing the knife at the officers until a backup officer arrived and kicked the knife from Sheehan's hand. The officers testified that Sheehan was between two and four feet from Holder when Holder first fired – so close that Holder was forced to fire from the hip to prevent Sheehan from cutting her arm.

In Sheehan's telling, she opened the door and showed the officers the knife. She had the knife upraised in her right hand and took one step toward the officers. This step placed her on the threshold and

---

[3] The officers used considerable force in gaining entry. Sergeant Reynolds first tried to get the door open, presumably by kicking and shouldering it, without success. When she could not force it open, Officer Holder took over. She unsuccessfully tried to kick it open. She then resorted to using her shoulder. After four to six such attempts, the door finally budged. The officers also had their firearms drawn, itself a significant use of force.

it was at that point that she was pepper sprayed by the officers. Sheehan testified:

> And then I screamed at them. You're blinding me, you're blinding me. I can't see. And then I started to fall. And they right away were shooting me. I started to come out the door because I was blinded. I had my knife in my hand. I was wearing my glasses. And I started to raise my other arm. And then the shots happened. . And then I fell against the wall in the corridor. Close to the kitchen door.

After she fell to the floor, an officer kicked the knife from her hand. Sheehan acknowledges that she continued to hold the knife after she was pepper sprayed and shot. She also concedes that it was her intent to resist arrest and to use the knife to defend herself against the officers because she did not want to be removed from her home or detained for a 72-hour evaluation.

There is some dispute over whether Sheehan was standing, falling or had reached the ground when Reynolds fired the final shot. Holder testified that Sheehan had already reached the ground. Reynolds testified that Sheehan was still standing. Sheehan testified that she was falling against the wall.

Sheehan survived the shooting, and the city prosecuted her for two counts of assault with a deadly weapon, two counts of assaulting a police officer with a deadly weapon and one count of making criminal threats against Hodge. *See* Cal. Penal Code §§ 245(a),

(c), 422. The jury hung on the four assault counts and acquitted on the criminal threats count. The city elected not to retry Sheehan.

Sheehan then filed this 42 U.S.C. § 1983 action against the City and County of San Francisco, Police Chief Heather Fong, Sergeant Reynolds and Officer Holder, alleging violations of her Fourth Amendment rights against unreasonable search and seizure, including a warrantless search and use of excessive force. She also alleged violation of her rights under the Americans with Disabilities Act and state law claims for assault and battery, negligence, intentional infliction of emotional distress and violation of California Civil Code § 52.1. The district court granted the defendants' motion for summary judgment, and Sheehan timely appealed.

STANDARD OF REVIEW

We review the district court's summary judgment rulings, including its rulings on qualified immunity, de novo. *See Maxwell v. Cnty. of San Diego*, 697 F.3d 941, 947 (9th Cir. 2012). "Summary judgment should be granted 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Id.* (quoting Fed. R. Civ. P. 56(a)). We view the evidence in the light most favorable to Sheehan, the nonmoving party, and draw all reasonable inferences in her favor. *See id.*

Qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *See Pearson v. Callahan*, 555 U.S. 223, 231 (2009). To determine whether a government official is entitled to qualified immunity, we conduct a two-part analysis. Government officials are denied qualified immunity only if (1) the facts that a plaintiff has alleged or proved show a violation of a constitutional right and (2) the right at issue was clearly established at the time of the defendant's alleged misconduct. *See id.* at 232. We have discretion in deciding which of the two qualified immunity prongs should be addressed first. *See id.* at 242.

DISCUSSION

I. FOURTH AMENDMENT

Sheehan contends that the officers violated her Fourth Amendment rights by entering her home without a warrant and using excessive force. We evaluate the officers' actions in the sequence in which they occurred.

A. Initial Entry

We reject Sheehan's contention that the officers violated her Fourth Amendment rights by initially entering her home without a warrant.

1.

Searches and seizures inside a home without a warrant are presumptively unreasonable, but that presumption is not irrebuttable, and a warrantless search or seizure is permitted to render emergency aid or address exigent circumstances. *See United States v. Struckman,* 603 F.3d 731, 737-38 (9th Cir. 2010). The emergency aid exception applies when: "(1) considering the totality of the circumstances, law enforcement had an objectively reasonable basis for concluding that there was an immediate need to protect others or themselves from serious harm; and (2) the search's scope and manner were reasonable to meet the need." *United States v. Snipe,* 515 F.3d 947, 952 (9th Cir. 2008). To satisfy the exigency exception, the government must prove: (1) that the officer had probable cause to search or arrest; and (2) that exigent circumstances justified the warrantless intrusion. *See Hopkins v. Bonvicino,* 573 F.3d 752, 766-67 (9th Cir. 2009). Exigent circumstances include "those circumstances that would cause a reasonable person to believe that entry was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts," *United States v. McConney,* 728 F.2d 1195, 1199 (9th Cir. 1984) (en banc), *overruled on other grounds by Estate of Merchant v. Comm'r,* 947 F.2d 1390, 1392-93 (9th Cir. 1991), or when police are in hot pursuit of a

suspect, *see United States v. Johnson,* 256 F.3d 895, 907 (9th Cir. 2001) (en banc) (per curiam).

A search or seizure conducted pursuant to either of these exceptions must be carried out in a reasonable manner. Under the emergency aid exception, "the search's scope and manner [must be] reasonable to meet the need." *Snipe,* 515 F.3d at 952; *see also Brigham City v. Stuart,* 547 U.S. 398, 406-07 (2006) (examining whether "[t]he manner of the officers' entry was also reasonable" under the emergency aid exception). Similarly, under the exigent circumstances exception officers are required to use reasonable force in carrying out the search or seizure. As we said in *Fisher v. City of San Jose,* 558 F.3d 1069 (9th Cir. 2009) (en banc), where we applied the exigent circumstances exception:

> Nothing in today's opinion even hints at disturbing the Fourth Amendment requirement that the force, deadly or not, used in the course of arrest, investigatory stop, or other "seizure" of a person must satisfy the "objective reasonableness" standard. To be clear, we do not suggest that the initial exigency and seizure thereafter condoned unfettered force to resolve the armed standoff, discharged all of Fisher's Fourth Amendment protections, or reduced in any way the probable cause needed to arrest. A court can certainly later examine the officers' actions in connection with a suspect's subsequent criminal trial or a collateral civil rights suit for

> other alleged Fourth Amendment violations, as the jury did here.

Id. at 1084 (citation omitted).

Under the circumstances of this case, we see no meaningful distinction between the emergency aid exception's requirement that a search or seizure be conducted in a reasonable manner and the Fourth Amendment's requirement that it be carried out without the use of excessive force. Both inquiries stem from the common principle that an otherwise lawful search or seizure – whether justified by a warrant or by an exception to the warrant requirement – "may be invalid if carried out in an *unreasonable* fashion." *Franklin v. Foxworth*, 31 F.3d 873, 875 (9th Cir. 1994). Thus, regardless of whether the officers rely on the emergency aid exception or the exigent circumstances exception, they were required to conduct the search or seizure in a reasonable manner, using reasonable force. We therefore apply the Supreme Court's excessive force standard to both inquiries.[4]

Under that standard, "[d]etermining whether the force used to effect a particular seizure is reasonable

---

[4] It also [sic] immaterial whether we characterize the officers' entry as a search or a seizure. Regardless, they were required to use reasonable force. *See Hopkins*, 573 F.3d at 776 ("It is clearly established that the use of excessive force in effecting a seizure violates the Fourth Amendment."); *Boyd v. Benton Cnty.*, 374 F.3d 773, 780 (9th Cir. 2004) ("This Circuit has clearly recognized that the use of excessive force during a search makes that search unreasonable under the Fourth Amendment.").

under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Graham v. Connor,* 490 U.S. 386, 396 (1989) (internal quotation marks omitted). This test of reasonableness "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* The reasonableness of a particular use of force, moreover, "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," making "allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Id.* at 396-97.

2.

Applying these standards here, we hold that the officers' initial entry into Sheehan's home was lawful under the emergency aid exception.

First, the officers had an objectively reasonable basis for concluding that there was an urgent need to protect Sheehan from serious harm. The officers knew that Sheehan was off her medication, was not taking care of herself and had acted in a threatening

manner toward Hodge. They were also aware that, in Hodge's view, she was both "gravely disabled" and in need of temporary, involuntary hospitalization to receive psychological evaluation and treatment. Sheehan points out that she may not have required *immediate* assistance. Hodge had not suggested Sheehan was suicidal and the conditions Hodge described – not eating, not taking medication, not changing clothes – suggested a gradual rather than a sudden deterioration. The officers, however, reasonably took a cautious view of the situation. Hodge, who was a trained social worker and personally familiar with Sheehan's condition, considered the situation dire enough to apply for a § 5150 detention and to call for police assistance in transporting Sheehan to a mental health facility. Hodge had telephoned the police immediately after his encounter with Sheehan, suggesting that the situation was urgent. Sheehan's threatening behavior toward Hodge suggested that her condition had deteriorated precipitously, again suggesting urgency. Under the circumstances, the officers acted reasonably by treating the situation as a genuine emergency. As we stated in *United States v. Black*, (9th Cir. 2007):

> This is a case where the police would be harshly criticized had they not investigated. Erring on the side of caution is exactly what we expect of conscientious police officers. This is a "welfare search" where rescue is the objective, rather than a search for crime. We should not second-guess the

> officers['] objectively reasonable decision in such a case.

Id. at 1040. *See also Michigan v. Fisher,* 558 U.S. 45, 49 (2009) (per curiam) ("Officers do not need ironclad proof of 'a likely serious, life-threatening' injury to invoke the emergency aid exception.").

Second, the officers carried out the search or seizure in a reasonable manner up to and including the initial entry. Accompanied by Hodge, the officers knocked and announced that they were police officers. They then used a pass key supplied by Hodge to let themselves in for the purpose of assessing whether Sheehan needed emergency treatment under § 5150. Their weapons were not drawn and they had no reason to believe that their entry would trigger a violent confrontation. The officers therefore used reasonable force under the circumstances.

Accordingly, we hold that the officers' initial entry into Sheehan's home did not violate the Fourth Amendment.[5]

---

[5] Because we hold that the initial entry falls under the emergency aid exception, we need not decide whether the exigent circumstances exception would also apply. Nor need we address whether the officers' warrantless entry may have been covered by a "special need" exception to the warrant requirement. *See Griffin v. Wisconsin,* 483 U.S. 868, 873 (1987). The First and Third Circuits have held that a special need exception applies when police officers enter a subject's home to take her into custody pursuant to a state law authorizing emergency hospitalization of a person suffering from mental illness. *See Doby*

(Continued on following page)

B. Second Entry

We hold, however, that there are triable issues of fact as to whether the second entry violated the Fourth Amendment.

1.

We do not suggest that the officers are liable for acting without a warrant. There are at least two, and possibly three, reasons why the officers were permitted to act without a warrant at the time of the second entry. First, the officers continued to have an objectively reasonable basis for concluding that there was an urgent need to protect Sheehan from serious harm, satisfying the emergency aid exception's first prong. *See Snipe,* 515 F.3d at 952.[6] The emergency

---

v. DeCrescenzo, 171 F.3d 858, 872 (3d Cir. 1999); *McCabe v. Life-Line Ambulance Serv., Inc.,* 77 F.3d 540, 553 (1st Cir. 1996). The parties have not raised that issue here, however.

[6] The two prongs of the emergency aid exception address distinct Fourth Amendment requirements. The first prong – whether law enforcement had an objectively reasonable basis for concluding that there was an immediate need to protect others or themselves from serious harm – addresses whether the officers proceeded lawfully by acting without a warrant. The second prong – whether the search's scope and manner were reasonable to meet the need – addresses whether, even if a warrant was not required, the officers carried out the search or seizure in an unreasonable manner. A search or seizure comports with the Fourth Amendment only if both prongs are satisfied. *Cf. Fisher,* 558 F.3d at 1080, 1084 (holding that the Fourth Amendment's warrant requirement was satisfied under the exigent circumstances exception but that the officers still could be liable for

(Continued on following page)

that existed at the time of the initial entry was no less apparent at the time of the second entry. On the contrary, Sheehan's behavior toward the officers during their initial entry only confirmed that her condition had deteriorated to the point of creating an emergency. Second, because the two entries were part of a single, continuous search or seizure, the officers are not required to separately justify the continuing emergency with respect to the second entry. *See Michigan v. Tyler,* 436 U.S. 499, 511 (1978) ("[W]e find that the morning entries were no more than an actual continuation of the first, and the lack of a warrant thus did not invalidate the resulting seizure of evidence" where the initial entry was justified by exigent circumstances); *Fisher,* 558 F.3d at 1077 ("[W]e conclude that when Fisher was seized at the beginning of the standoff, the officers were not required to periodically reassess whether the exigency persisted throughout the standoff because the standoff was 'no more than an actual continuation' of the initial seizure."); *United States v. Kaplan,* 895 F.2d 618, 623 (9th Cir. 1990); *United States v. Echegoyen,* 799 F.2d 1271, 1280 (9th Cir. 1986).[7] Third, although the point

---

carrying out the seizure in an unreasonable manner). The first prong is satisfied here, justifying the officers for acting without a warrant. But there are triable issues as to whether the second prong is satisfied.

[7] Although the continuous search doctrine applies here, that doctrine speaks only to the warrant requirement, not to the separate requirement that officers carry out a search or seizure in a reasonable manner. *See Fisher,* 558 F.3d at 1084. Thus, although the officers were not required to reassess the existence of

(Continued on following page)

is debatable, the officers may have been justified in acting without a warrant under the exigent circumstances exception.[8] That the officers did not have a warrant at the time of the second entry, therefore, did not violate the Fourth Amendment.

2.

We are not persuaded, however, that the officers carried out the search or seizure in a reasonable manner at the point of the second entry. As we have explained, regardless of whether the officers invoke the emergency aid exception or the exigent circumstances exception, they were required to carry out the search or seizure in a reasonable manner, without the

---

an emergency or the need for a warrant periodically, they were required *at all times* to conduct the search or seizure in a reasonable manner.

[8] Because we hold that the absence of a warrant was justified under both the emergency aid exception and the continuous search doctrine, we need not address whether the exigent circumstances exception applies to the second entry. Whether as a matter of law it would apply is at least questionable. By the time of the second entry, the officers had probable cause to believe Sheehan had committed a crime by threatening the officers. Arguably, the officers could have avoided harm to themselves by retreating a safe distance from the door; the knife was not in imminent danger of destruction; there was no "hot pursuit" given that Sheehan "was already inside the [room] when the police officers arrived," *Struckman,* 603 F.3d at 744; and given that Hodge had informed them that the only way out of the room was an inaccessible second story window, and Sheehan had shown no interest in leaving her room, there was no reason to fear Sheehan's escape.

use of excessive force. *See Fisher,* 558 F.3d at 1084; *Snipe,* 515 F.3d at 952. Although we have no trouble with the manner in which the officers carried out the search or seizure up to and including the initial entry, we cannot say as a matter of law that the officers continued to carry out the search or seizure in a reasonable manner when they decided to force the second entry, without taking Sheehan's mental illness into account and in an apparent departure from their police officer training.[9]

Sheehan presented an expert report by Lou Reiter, a former deputy chief of the Los Angeles Police Department. We treat Reiter's report as relevant evidence of reasonableness, as we are required to do. Although we have held that the mere fact that an expert disagrees with an officer's actions does not itself compel the conclusion that the officer's actions were unreasonable, *see Billington v. Smith,* 292 F.3d 1177, 1189 (9th Cir. 2002); *Reynolds v. Cnty. of San Diego,* 84 F.3d 1162, 1170 (9th Cir. 1996), *overruled on other grounds by Acri v. Varian Assocs., Inc.,* 114 F.3d

---

[9] In examining whether the officers conducted the search or seizure in a reasonable manner at the point of the second entry, we do not focus on the amount of force they employed to force open the door (considerable) and that they did so with their firearms drawn (itself a significant use of force). *See* footnote 3, *supra.* Rather, we focus on their critical decision to enter at all. *See Alexander v. City & Cnty. of San Francisco,* 29 F.3d 1355, 1366-67 (9th Cir. 1994) (holding that there were triable issues as to whether officers used excessive force by storming the house of a mentally ill recluse who had threatened to shoot anybody who entered).

999, 1001 (9th Cir. 1997), a rational jury may rely upon expert evidence in assessing whether an officer's use of force was unreasonable, *see Glenn v. Washington Cnty.*, 673 F.3d 864, 877 (9th Cir. 2011); *Smith v. City of Hemet,* 394 F.3d 689, 703 (9th Cir. 2005) (en banc); *Reynolds,* 84 F.3d at 1169. Reiter's report is therefore relevant to the excessive force inquiry.

Reiter described general police practices for dealing with persons who are mentally ill or emotionally disturbed, explaining that officers are trained not to unreasonably agitate or excite the person, to contain the person, to respect the person's comfort zone, to use nonthreatening communications and to employ the passage of time to their advantage. He also cited materials used by the San Francisco Police Department to train officers on "appropriate tactical actions" to be used when confronting the mentally ill. These materials, which are germane to the excessive force inquiry because they were designed to protect individuals such as Sheehan from harm, *see Scott v. Henrich,* 39 F.3d 912, 915-16 (9th Cir. 1994), advise officers to request backup, to calm the situation, to communicate, to move slowly, to assume a quiet, nonthreatening manner, to take time to assess the situation and to "give the person time to calm down."

Reiter deemed the officers' second entry into Sheehan's home tactically unreasonable under those policies. In his view, the officers should have "elected to relocate to a safer tactical position, call for

special units/equipment, and determine the propriety of seeking a warrant." He opined that there was

> no logical reason that the officers did not pull back from the landing outside Ms. Sheehan's private residence after their first attempt to enter. The location was a tactical disadvantage for the officers. Both officers knew that Ms. Sheehan had refused their entry and made specific comments regarding the necessity for a warrant. They knew that other resources were en-route to their call for backup. Officer Holder's and Sgt. Reynold's [sic] continued conduct exacerbated the confrontation, rather than any effort to [defuse] the agitation.

In view of Reiter's report, the officers' training and the totality of the circumstances – viewing the facts favorably to Sheehan as we must – we conclude that a reasonable jury could find that the officers' decision to force a confrontation with Sheehan was objectively unreasonable. *See Alexander v. City & Cnty. of San Francisco,* 29 F.3d 1355, 1366 (9th Cir. 1994) (explaining that the operative question is whether "the force the police used was unreasonable under *all* of the circumstances"). Although Sheehan needed assistance, the officers had no reason to believe that a delay in entering her room would cause her serious harm, especially when weighed against the high likelihood that a deadly confrontation would ensue if they forced a confrontation. Sheehan was not suicidal, *cf. Fitzgerald v. Santoro,* 707 F.3d 725, 731 (7th Cir. 2013); *West v. Keef,* 479 F.3d 757, 759 (10th

Cir. 2007); *Bias v. Moynihan*, 508 F.3d 1212, 1220 (9th Cir. 2007), or bleeding to death. In addition, although the officers may have been justified in believing that Sheehan had assaulted them and should be arrested, under her version of the facts there was no immediate need to subdue her and take her into custody. A reasonable jury could find that Sheehan was in a confined area and not a threat to others – so long as they did not invade her home.

According to Hodge, the officers knew that there was no way out of the room other than the door they were guarding and that there were no other occupants in the building, facts that distinguish this case from those in which officers' more confrontational tactics were held to be reasonable based on the need to protect others. *See, e.g., Reynolds*, 84 F.3d at 1168 ("Reynolds was not in a confined area and there were other people in the vicinity."); *Estate of Bennett v. Wainwright*, 548 F.3d 155, 169 (1st Cir. 2008) ("[A] reasonable officer under the circumstances could have reasonably believed that entering the house without first obtaining a warrant or express consent was necessary to prevent injury to Bennett himself, and to the family members present inside."), *overruled on other grounds by Maldonado v. Fontanes*, 568 F.3d 263, 269 (1st Cir. 2009); *Black*, 482 F.3d at 1039 ("The police were justified in their entry because they feared that [a domestic violence victim] could have been inside the apartment, badly injured and in need of medical attention. "); *Ewolski v. City of Brunswick*, 287 F.3d 492, 502 (6th Cir. 2002) (the subject's

"dramatic reaction" to police, "combined with the officers' knowledge that he was armed and volatile and that his wife and child were in the house with him, reveals an undisputed body of evidence from which a reasonable officer could have reasonably concluded that there was an immediate threat to [the subject's] wife and son"). Sheehan, with some force, argues that whatever her behavior in resisting unwanted medical assistance and claiming the sanctity of her home, once the officers exited her room and her door was shut the threats to the safety of the officers or others were under control and there was no need to force a confrontation. Of significance, all of the information known to the officers suggested that Sheehan wanted only to be left alone in her home. She had shown no desire to leave the room. Although she had acted in a threatening manner, she had done so only to those who had entered her home without her permission. The officers also were aware that Sheehan, who they knew was both mentally ill and emotionally disturbed, was not likely to respond rationally to police officers breaking down her door. A rational person, recognizing that she was outnumbered and facing superior firepower, might have been expected to drop the knife and surrender. As the officers knew, however, Sheehan was mentally ill and acting irrationally, and, given her initial reaction to the officers, likely to react violently to an escalating show of force. As we explained in *Deorle v. Rutherford,* 272 F.3d 1272 (9th Cir. 2001), the tactics to be employed against an

> emotionally distraught individual who is creating a disturbance or resisting arrest are ordinarily different from those involved in law enforcement efforts to subdue an armed and dangerous criminal who has recently committed a serious offense. In the former instance, increasing the use of force may, in some circumstances at least, exacerbate the situation; in the latter, a heightened use of less-than-lethal force will usually be helpful in bringing a dangerous situation to a swift end.

Id. at 1282-83; *see also Glenn*, 673 F.3d at 875 ("Another circumstance relevant to our analysis is whether the officers were or should have been aware that Lukus was emotionally disturbed."); *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1058 (9th Cir. 2003) (if "it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining, under *Graham*, the reasonableness of the force employed" (quoting *Deorle*, 272 F.3d at 1283)).[10] The officers' decision to force an entry was in effect a decision to cause a violent – and potentially deadly – confrontation with a mentally ill person without a countervailing need. Thus, on this record, we cannot say as a matter of law that the officers conducted the search or seizure in a reasonable manner

---

[10] In contrast to *Deorle*, Sheehan was armed. But she was also contained (or so a reasonable jury could find), so *Deorle* remains relevant.

or used appropriate force by forcing their way back into Sheehan's home.

Of course, a reasonable jury could find that the officers acted reasonably by forcing the entry. Whether Sheehan was contained, the officers had reason to fear Sheehan's escape, the officers knew the building was empty and the officers could have ensured their safety by retreating are all disputed facts that a jury could resolve in the officers' favor. To find the officers liable, moreover, the jury would have to conclude not only that freezing or attempting to de-escalate the situation were reasonable courses of action but also that forcing an entry was *unreasonable*. *See Glenn*, 673 F.3d at 876 (explaining that police officers "need not avail themselves of the least intrusive means of responding to an exigent situation" and that "they need only act within that range of conduct we identify as reasonable" (quoting *Scott*, 39 F.3d at 915) (internal quotation marks omitted)). Viewing the evidence favorably to Sheehan, however, we cannot say that the officers acted reasonably *as a matter of law*.

3.

Having determined that a reasonable jury could find a Fourth Amendment violation, we next consider whether the officers are nonetheless entitled to qualified immunity. At this stage of the proceedings, the operative question is whether, again viewing the facts in the light most favorable to Sheehan, the officers violated a clearly established Fourth Amendment

right of which all but the plainly incompetent would have been aware. *See Stanton v. Sims,* 134 S. Ct. 3, 5 (2013) (per curiam).

As noted, determining whether the force used to effect a particular search or seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake. *See Graham,* 490 U.S. at 396. Put differently, we "balance the amount of force applied against the need for that force." *Meredith v. Erath,* 342 F.3d 1057, 1061 (9th Cir. 2003). Construing the facts favorably to Sheehan, the officers' intrusion on Sheehan's Fourth Amendment rights was profound – the officers forced an entry into her home, apparently without warning and with guns drawn, under conditions that were likely to result in her death. On the other side of the equation, the governmental interest in the intrusion was minimal because she was fully contained, not a flight risk and not a danger to the safety of the officers or others, backup was on the way; and trained negotiators could have been used to defuse the crisis. If there was no pressing need to rush in, and every reason to expect that doing so would result in Sheehan's death or serious injury, then any reasonable officer would have known that this use of force was excessive. *See Deorle,* 272 F.3d at 1281-85 (holding that the use of nonlethal force was excessive when the officers had a clear line of retreat and

"could easily have avoided a confrontation, and awaited the arrival of a negotiating team").

Our decision in *Alexander v. City & County of San Francisco,* 29 F.3d 1355 (9th Cir. 1994), is instructive. There, police were present outside the decedent Quade's home to assist in executing an administrative forcible entry warrant permitting local health officials to inspect the home for a sewage leak. *See id.* at 1358. Quade refused to let the inspectors in and threatened to shoot anyone who entered. *See id.* The officers cordoned off the area, attempted to negotiate a peaceful resolution of the standoff for an hour and then forcibly entered the home. *See id.* When the officers entered, Quade pointed and fired a gun at the officers, who returned fire, shooting and killing him. *See id.* The plaintiff (Quade's executor) alleged that the officers used excessive force, challenging not the shooting itself but rather the force the officers used in entering the house. *See id.* at 1366 & n.12. We denied summary judgment to the defendants both on the merits and on their qualified immunity defense. *See id.* at 1366-67. We held that the plaintiff's claim "that it was unreasonable for the officers to storm the house of a man whom they knew to be a mentally ill, elderly, half-blind recluse who had threatened to shoot anybody who entered" stated "a classic Fourth Amendment violation under *Graham.*" *Id.* at 1366. We said that, if the jury were to find that the officers stormed the house to carry out the health inspection, "then the jury may also conclude that the

force used was excessive in relation to the purpose for which it was used." *Id.* at 1367.

Alexander and this case have much in common. In both cases, police officers had a legal right to enter a person's home (to render emergency aid in Sheehan's case and to execute an administrative warrant in *Alexander*). In both cases, the subject was contained and had threatened those who entered. In both, the officers knew they were dealing with someone who was mentally ill and acting irrationally. And in both, police officers decided to force an entry, knowing it was likely to result in a violent confrontation, absent the need to do so. Indeed, the facts here are in one respect even more troubling than those in *Alexander*. The officers radioed for reinforcements in both cases, but only in *Alexander* did the officers wait for backup to arrive and at least attempt negotiation before storming in.[11]

Although the facts of *Alexander* are not identical to those of this case, *Graham*, *Alexander* and *Deorle*

---

[11] We acknowledge that *Alexander* has been limited by subsequent circuit precedent to the extent it informs our provocation doctrine – the principle discussed in part I.C. of this opinion that an officer may be liable for an otherwise reasonable use of deadly force when the officer has intentionally or recklessly provoked the deadly confrontation. *See George v. Morris*, 736 F.3d 829, 839 n.14 (9th Cir. 2013); *Billington*, 292 F.3d at 1188-91. Those cases are inapplicable here, however, where the issue at this point is not whether *the shooting* violated the Fourth Amendment (on a provocation theory) but rather whether the officers' antecedent *forcible entry* did.

would have placed any reasonable, competent officer on notice that it is unreasonable to forcibly enter the home of an armed, mentally ill subject who had been acting irrationally and had threatened anyone who entered when there was no objective need for immediate entry. We emphasize that at trial the facts may show that Sheehan was not contained, that she presented a flight risk, that officers or others were in danger, or that the officers reasonably but mistakenly believed that their entry was necessary to prevent Sheehan's escape or ensure the safety of themselves or others. The facts, however, are disputed, and it would be premature to hold at this stage of the proceedings that the officers are – as a matter of law – entitled to qualified immunity. *See Glenn,* 673 F.3d at 870 & n.7; *Alexander,* 29 F.3d at 1366-67.[12]

C. Deadly Force

We turn, then, to the officers' use of deadly force. "[A]n officer's use of deadly force is reasonable if 'the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.'" *Reynolds,* 84 F.3d at

---

[12] If Sheehan is able to establish that the second entry violated the Fourth Amendment (and the officers are not entitled to qualified immunity), then she can recover damages proximately caused by the violation. *See Jackson v. Gates,* 975 F.2d 648, 655 (9th Cir. 1992) ("Under § 1983 Jackson was entitled to sue for all consequential damages resulting from the violation of his Fourth Amendment rights.").

1167 (quoting *Tennessee v. Garner*, 471 U.S. 1, 3 (1985)). "Thus, where a suspect threatens an officer with a weapon such as a gun or a knife, the officer is justified in using deadly force." *Smith v. City of Hemet*, 394 F.3d 689, 704 (9th Cir. 2005) (en banc).

Here, the officers' use of deadly force – *viewed from the standpoint of the moment of the shooting* – was reasonable as a matter of law. Although the parties disagree over the details surrounding the shooting, the material facts are undisputed: Sheehan had threatened to kill the officers, she wielded a knife in an upraised position, she advanced toward the officers, she did not drop the knife after being pepper sprayed (or even after being shot) and the shooting took place while Sheehan was only a few feet from a cornered Officer Holder. Although Sheehan insists that she was blinded and disabled by the pepper spray, she indisputably continued to hold the knife and advance toward the officers, in cramped quarters, after being sprayed. Thus, even if Sheehan *in fact* was not intending to attack the officers at that point in the confrontation, the officers reasonably believed they were still in danger. At the moment of the shooting, the defensive use of deadly force, although unfortunate, did not violate the Fourth Amendment.

We must also consider whether the shooting was reasonable when the events leading up to the shooting are taken into account. As previously discussed, "where an officer intentionally or recklessly provokes a violent confrontation, if the provocation is an independent Fourth Amendment violation, he may be

held liable for his otherwise defensive use of deadly force." *Billington*, 292 F.3d at 1189 (emphasis added) [sic]. Here, Sheehan has presented a triable issue as to whether the officers committed an independent Fourth Amendment violation by their forcible second entry into her room, as discussed above. In addition, Sheehan has presented evidence from which a reasonable jury could find that the officers acted recklessly in failing to take Sheehan's mental illness into account and in forcing a deadly confrontation rather than freezing or attempting to de-escalate the situation. We therefore hold that there are triable issues of fact as to whether the shooting was unreasonable on a provocation theory.

Finally, we address Sheehan's claim that Sergeant Reynolds' final shot amounted to excessive force. Assuming, as we must, that Sheehan had already reached the ground when Reynolds fired the final shot, we nonetheless hold that Reynolds is entitled to qualified immunity. Even if Reynolds continued to fire after Sheehan reached the ground, "it is clear from the very brief time that elapsed that [Reynolds] made a split-second judgment in responding to an imminent threat and fired a fusillade in an emergency situation." *Berube v. Conley*, 506 F.3d 79, 85 (1st Cir. 2007). Reynolds' actions "cannot be found unreasonable because she may have failed to perfectly calibrate the amount of force required to protect herself." *Id.* Even if Sheehan was on the ground, she was certainly not subdued, and she continued to hold a knife and threaten the officers, especially Holder,

who was cornered and in close proximity to Sheehan. Sheehan has presented no authority holding that the use of deadly force under similar circumstances was excessive. Thus, Reynolds is entitled to qualified immunity on this basis.

II. *MONELL* CLAIMS

Sheehan asserted § 1983 claims against the city under *Monell v. Department of Social Services of the City of New York,* 436 U.S. 658 (1978). She raises two theories of municipal liability: (1) failure to train and (2) ratification. We hold that the district court properly granted summary judgment to the city on each of these claims.

A. Failure to Train

"The 'inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.'" *Price v. Sery,* 513 F.3d 962, 973 (9th Cir. 2008) (quoting *City of Canton v. Harris,* 489 U.S. 378, 388 (1989)). Here, Reynolds acknowledges that she did not take Sheehan's mental illness into account when she ordered the second entry into Sheehan's room. Sheehan, however, has not pointed to anything in the record to suggest that Reynolds' training was responsible for her decision to disregard Sheehan's mental illness. On the contrary, Sheehan concedes that the department employed appropriate training materials

to guide police officers' responses to persons they knew to be suffering from mental illness. That Reynolds may have disregarded her training does not show that the city was deliberately indifferent.

B. Ratification

Sheehan's ratification theory also fails. "To show ratification, a plaintiff must prove that the 'authorized policymakers approve a subordinate's decision and the basis for it.'" *Christie v. Iopa,* 176 F.3d 1231, 1239 (9th Cir. 1999) (quoting *City of St. Louis v. Praprotnik,* 485 U.S. 112, 127 (1988)). "We have found municipal liability on the basis of ratification when the officials involved adopted and expressly approved of the acts of others who caused the constitutional violation." *Trevino v. Gates*, 99 F.3d 911, 920 (9th Cir. 1996).

Sheehan contends that the city ratified the officers' conduct by not disciplining them. Ratification, however, generally requires more than acquiescence. There is no evidence in the record that policymakers "made a deliberate choice to endorse" the officers' actions. *Gillette v. Delmore,* 979 F.2d 1342, 1348 (9th Cir. 1992). The mere failure to discipline Reynolds and Holder does not amount to ratification of their allegedly unconstitutional actions. *See Clouthier v. Cnty. of Contra Costa,* 591 F.3d 1232, 1253-54 (9th Cir. 2010) (holding that the failure to discipline employees, without more, was insufficient to establish ratification); *Santiago v. Fenton,* 891 F.2d 373, 382

(1st Cir. 1989) (refusing to hold that the "failure of a police department to discipline in a specific instance is an adequate basis for municipal liability under *Monell*").

III. AMERICANS WITH DISABILITIES ACT

We next address Sheehan's claim that the city violated her rights under the Americans with Disabilities Act (ADA).

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Discrimination includes a failure to reasonably accommodate a person's disability. As United States Department of Justice regulations state:

> A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

28 C.F.R. § 35.130(b)(7).

We have not previously addressed whether the ADA applies to arrests, *see Thompson v. Davis*, 295

F.3d 890, 897 (9th Cir. 2002), and the question is a matter of some disagreement among other circuits. The Fifth Circuit has held that "Title II does not apply to an officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life." *Hainze v. Richards,* 207 F.3d 795, 801 (5th Cir. 2000). Other circuits have declined to adopt the Fifth Circuit's approach. In *Bircoll v. Miami-Dade County,* 480 F.3d 1072 (11th Cir. 2007), the Eleventh Circuit held that "the question is not so much one of the applicability of the ADA because Title II prohibits discrimination by a public entity by reason of [a person's] disability. The exigent circumstances presented by criminal activity and the already onerous tasks of police on the scene go more to the reasonableness of the requested ADA modification than whether the ADA applies in the first instance." *Id.* at 1085. Similarly, in *Gohier v. Enright,* 186 F.3d 1216 (10th Cir. 1999), the Tenth Circuit held that "a broad rule categorically excluding arrests from the scope of Title II is not the law." *Id.* at 1221. In *Waller ex rel. Estate of Hunt v. City of Danville,* 556 F.3d 171, 175 (4th Cir. 2009), the Fourth Circuit reserved judgment on the Fifth Circuit's approach and then went on to consider a reasonable accommodation claim involving an arrest. Like the Eleventh Circuit, *Waller* held that "exigency is one circumstance that bears materially on the inquiry into reasonableness under the ADA." *Id. See also Tucker v. Tennessee,* 539 F.3d 526, 534

(6th Cir. 2008) (addressing a Title II reasonable accommodation claim in which the plaintiffs asserted that police officers "discriminated against them in violation of the ADA by failing to provide a qualified sign language interpreter or other such reasonable accommodation(s) during the domestic disturbance call that resulted in their arrest").

We agree with the majority of circuits to have addressed the question that Title II applies to arrests. The ADA applies broadly to police "services, programs, or activities." 42 U.S.C. § 12132. We have interpreted these terms to encompass "anything a public entity does." *Barden v. City of Sacramento,* 292 F.3d 1073, 1076 (9th Cir. 2002) (quoting *Lee v. City of Los Angeles,* 250 F.3d 668, 691 (9th Cir. 2001)) (internal quotation marks omitted). The ADA therefore applies to arrests, though we agree with the Eleventh and Fourth Circuits that exigent circumstances inform the reasonableness analysis under the ADA, just as they inform the distinct reasonableness analysis under the Fourth Amendment. *See Waller,* 556 F.3d at 175 ("Just as the constraints of time figure in what is required of police under the Fourth Amendment, they bear on what is reasonable under the ADA.").

Courts have recognized at least two types of Title II claims applicable to arrests: (1) wrongful arrest, where police wrongly arrest someone with a disability because they misperceive the effects of that disability as criminal activity; and (2) reasonable accommodation, where, although police properly investigate and arrest a person with a disability for a crime unrelated

to that disability, they fail to reasonably accommodate the person's disability in the course of investigation or arrest, causing the person to suffer greater injury or indignity in that process than other arrestees. *See Waller,* 556 F.3d at 174; *Gohier,* 186 F.3d at 1220-21.

Sheehan raises the second type of claim here. She asserts that the officers failed to reasonably accommodate her disability by forcing their way back into her room without taking her mental illness into account and without employing tactics that would have been likely to resolve the situation without injury to herself or others. To state a claim under Title II of the ADA, a plaintiff generally must show: (1) she is an individual with a disability; (2) she is otherwise qualified to participate in or receive the benefit of a public entity's services, programs or activities; (3) she was either excluded from participation in or denied the benefits of the public entity's services, programs or activities or was otherwise discriminated against by the public entity; and (4) such exclusion, denial of benefits or discrimination was by reason of her disasbility. *See O'Guinn v. Lovelock Corr. Ctr.,* 502 F.3d 1056, 1060 (9th Cir. 2007). In a Title II claim grounded in a public entity's alleged failure to provide a reasonable accommodation under 28 C.F.R. § 35.130(b)(7), the plaintiff bears the initial burden of producing evidence of the existence of a reasonable accommodation. *See Vinson v. Thomas,* 288 F.3d 1145, 1154 (9th Cir. 2002). A public entity may defeat a reasonable accommodation claim by showing "that

making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7); *see Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1047 (9th Cir. 1999).

It is undisputed that Sheehan had a disability and that the officers knew it at the time they encountered her. We turn, therefore, to whether the city discriminated against Sheehan by failing to provide a reasonable accommodation during the second entry. Sheehan asserts that the city failed to provide a reasonable accommodation when the officers forced their way back into her room without taking her mental illness into account. She asserts that the officers should have respected her comfort zone, engaged in non-threatening communications and used the passage of time to defuse the situation rather than precipitating a deadly confrontation. We acknowledge that the officers were forced to make split-second decisions. A reasonable jury nevertheless could find that the situation had been defused sufficiently, following the initial retreat from Sheehan's room, to afford the officers an opportunity to wait for backup and to employ less confrontational tactics, including the accommodations that Sheehan asserts were necessary. For the reasons stated here, and because the reasonableness of an accommodation is ordinarily a question of fact, *see EEOC v. UPS Supply Chain Solutions*, 620 F.3d 1103, 1110 (9th Cir. 2010), we hold that the city is not entitled to judgment as a matter of law on Sheehan's ADA claim.

IV. STATE LAW CLAIMS

Sheehan asserts state law claims for negligence, assault and battery, intentional infliction of emotional distress and violation of California Civil Code § 52.1. The district court ruled that the defendants are immune from liability on those claims under California Welfare & Institutions Code § 5278, which provides: "Individuals authorized under this part to detain a person for 72-hour treatment and evaluation shall not be held either criminally or civilly liable for exercising this authority in accordance with the law."

In *Bias v. Moynihan,* 508 F.3d 1212, 1221 (9th Cir. 2007), we held that a police officer was immune under § 5278 from state law claims for assault and battery, false arrest, illegal imprisonment and intentional infliction of emotional distress where the officer had probable cause to take the plaintiff into custody in accordance with § 5150. The scope of § 5278 immunity, however, is not as all-encompassing as the defendants argue. Section 5278 is part of the Lanterman-Petris-Short Act, which must be construed to protect mentally disordered persons. *See Gonzalez v. Paradise Valley Hosp.,* 3 Cal. Rptr. 3d 903, 907 (Ct. App. 2003). In *Jacobs v. Grossmont Hospital,* 133 Cal. Rptr. 2d 9 (Ct. App. 2003), the California Court of Appeal held that

> the immunity of section 5278 extends to claims based on *circumstances that are inherent in an involuntary detention* pursuant to section 5150. Without the immunity provided by section 5278, an involuntary detention and

> treatment without consent would arguably constitute kidnapping, false imprisonment, or battery. Section 5278 was intended to provide immunity for claims based on *conduct that is expressly authorized by the LPS Act but would otherwise constitute a civil or criminal wrong.* [A] plaintiff who is properly detained in accordance with the LPS Act may not assert any civil claim based solely on the fact that he was detained, evaluated, or treated without his consent [but] section 5278 [does not] confer blanket immunity for any act or omission that might occur during a 72-hour hold, no matter how negligent, wrongful, or even criminal.

Id. at 15 (emphasis added).

Thus, § 5278 immunizes the police officers from the *decision to detain* Sheehan under § 5150. Section 5278 also immunizes the officers from liability for the *fact of Sheehan's detention.* Finally, § 5278 immunizes the officers based on circumstances *inherent* in her involuntary detention. *See id.* at 16. Section 5278, however, does not immunize the officers if they were negligent in executing the detention. Any injury Sheehan suffered from the officers' failure to exercise ordinary care in taking Sheehan into custody would not be an "inherent attribute[ ]" of her detention and therefore would not be subject to § 5278 immunity. *Id. Bias* does not hold to the contrary.

The district court therefore erred by granting summary judgment to the defendants under § 5278. The defendants argue that they are entitled to immunity

under several other statutes. *See* Cal. Gov't Code § 821.6; Cal. Penal Code §§ 196, 836.5, 835a, 847(b). Although we may affirm on any ground supported by the record, we decline to address the defendants' alternative arguments because they have not been passed upon by the district court. We therefore vacate the dismissal of these claims and remand to the district court.

CONCLUSION

The district court properly granted summary judgment to the defendants on Sheehan's warrantless entry Fourth Amendment claims and on her *Monell* claims against the city. The district court erred by granting summary judgment on Sheehan's Fourth Amendment claims challenging the manner of the second entry and the use of deadly force and on her ADA and state law claims. We therefore affirm the judgment in part, vacate it in part and remand for further proceedings. Each party shall bear its own costs on appeal.

AFFIRMED IN PART, VACATED IN PART AND REMANDED.

GRABER, Circuit Judge, concurring in part and dissenting in part:

Although I agree with the remainder of the opinion, I respectfully dissent from the majority's decision on the Fourth Amendment excessive force claim with

respect to the second entry into Plaintiff's apartment. Whether that second entry is viewed as a separate search or, instead, as part of one continuous search, the officers are entitled to qualified immunity even when taking all facts in the summary judgment record in Plaintiff's favor. Accordingly, I would affirm the summary judgment in favor of Defendants on that claim.

A. *If the Second Entry Is a Separate Search*

The second entry met an exception to the warrant requirement – the emergency aid doctrine or the exigent circumstances doctrine or both. Plaintiff was off her psychotropic medications, was not taking care of herself, and was making violent threats toward other people. Upon the first entry, which the majority agrees was lawful under the Fourth Amendment, Plaintiff had threatened to kill the officers while wielding a knife. Defendants did not know whether Plaintiff could escape from the apartment by another route, such as a window, or whether she had access to additional weapons, such as firearms, in either event creating the immediate possibility of harm to the officers, Plaintiff, and others. Accordingly, as the majority holds, the officers could enter the apartment for the second time without violating the warrant requirement of the Fourth Amendment.

As to the method of effecting the second entry, Defendants determinedly pushed the door open while holding pepper spray and a service weapon. In light

of the danger posed by Plaintiff, who held a knife and had threatened to kill the officers, the officers reasonably could conclude that entering the apartment in that way would not violate the Fourth Amendment's prohibition on the use of excessive force.

The expert's report that faulted the officers for electing to enter Plaintiff's apartment when and as they did does not create an issue of fact on either the timing or the method of the second entry. As we have cautioned, a plaintiff cannot avoid summary judgment merely by producing an expert's report opining that an officer's conduct was imprudent or inappropriate:

> We have since placed important limitations on *Alexander* [*v. City of San Francisco,* 29 F.3d 1355 (9th Cir. 1994)]. In *Scott v. Henrich,* [39 F.3d 912, 915 (9th Cir. 1994)], we held that even though the officers might have had "less intrusive alternatives available to them," and perhaps under departmental guidelines should have "developed a tactical plan" instead of attempting an immediate seizure, police officers "need not avail themselves of the least intrusive means of responding" and need only act "within that range of conduct we identify as reasonable." We reinforced this point in *Reynolds v. County of San Diego,* [84 F.3d 1162, 1169 (9th Cir. 1996),] which distinguished *Alexander* because "the court must allow for the fact that officers are forced to make split second decisions." We affirmed summary judgment for the defendant police officers despite experts'

> reports stating – like the expert report in the case at bar – that the officers should have called and waited for backup, rather than taking immediate action that led to deadly combat. [*Id.* at 1169-70.] We held that, even for summary judgment purposes, "the fact that an expert disagrees with the officer's actions does not render the officer's actions unreasonable." [*Id.* at 1170.] Together, *Scott* and *Reynolds* prevent a plaintiff from avoiding summary judgment by simply producing an expert's report that an officer's conduct leading up to a deadly confrontation was imprudent, inappropriate, or even reckless. [*Id.*] Rather, the court must decide as a matter of law "whether a reasonable officer could have believed that his conduct was justified." [*Id.*]

Billington v. Smith, 292 F.3d 1177, 1188-89 (9th Cir. 2002) (footnotes omitted).

B. *If the Second Entry Is Part of a Continuous Search*

The first and second entries may, in the alternative, be considered part of a single, continuous search. Insofar as the exigent circumstances that justified the first entry were ongoing, the second entry was justified under the emergency aid exception.

When the officers retreated from Plaintiff's apartment after she had threatened them with a knife upon their initial entry, they had confirmation that Plaintiff in fact had a deadly weapon and appeared

willing to use it. That is, Plaintiff's behavior toward the officers during their initial entry only confirmed that her condition had deteriorated to the point of creating an emergency. She was now out of sight behind closed doors, where additional weapons, including firearms, could have been present. It was objectively reasonable, therefore, for the officers to believe that Plaintiff was even *more* of a danger to herself and to others than they had assumed before the first entry. Here, as in *Michigan v. Tyler*, 436 U.S. 499, 511 (1978), and *Fisher v. City of San Jose*, 558 F.3d 1069, 1077 (9th Cir. 2009) (en banc), the passage of time was brief and the exigent circumstances that motivated the first entry "did not materially change from the beginning of the standoff to the end." Because the exigency persisted or worsened throughout, "the officers were not required to periodically reassess whether the exigency persisted throughout the standoff because the standoff was 'no more than an actual continuation' of the initial seizure." *Fisher*, 558 F.3d at 1077 (quoting *Tyler*, 436 U.S. at 511).

I would hold that reasonable officers could have concluded that they were entitled to continue the initial search and that determinedly pushing the door open with weapons readied was a reasonable amount of force when balanced against the need to resolve an ongoing emergency that involved a deadly weapon. *See Billington*, 292 F.3d at 1184 ("We analyze excessive force claims in the arrest context under the Fourth Amendment's reasonableness standard. We balance 'the nature and quality of the intrusion on

the individual's Fourth Amendment interests against the countervailing governmental interests at stake' and ask whether, under the circumstances, 'including the severity of the crime at issue, the suspect poses an immediate threat to the safety of the officers or others '" (quoting *Graham v. Connor*, 490 U.S. 386, 395-96 (1989))). In view of the extant legal principles, reasonable officers could conclude that their actions were permitted even though Plaintiff suffered from a mental illness. Police officers often interact with individuals who have a wide variety of specific needs, and there is no controlling case law that requires a different Fourth Amendment analysis for an officer on the street who faces those circumstances. *See Deorle v. Rutherford*, 272 F.3d 1272, 1283 (9th Cir. 2001) ("We do not adopt a per se rule [for excessive force] establishing two different classifications of suspects: mentally disabled persons and serious criminals."). Moreover, we must "judge reasonableness 'from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight' and allow 'for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.'" *Billington*, 292 F.3d at 1184 (quoting *Graham*, 490 U.S. at 396).

C. *Conclusion*

The district court properly granted summary judgment to Defendants on the Fourth Amendment

excessive force claim concerning the second entry into Plaintiff's apartment. Defendants are entitled to qualified immunity. I therefore respectfully dissent from the majority's contrary holding on that claim, but otherwise concur.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

TERESA SHEEHAN,

Plaintiff,

v.

CITY AND COUNTY OF SAN FRANCISCO, et al.,

Defendants.

/

No. C 09-03889 CRB

ORDER GRANTING SUMMARY JUDGMENT

(Filed May 6, 2011)

Plaintiff Teresa Sheehan has brought various section 1983 and state law claims against the City of San Francisco and two of its police officers. The officers shot Plaintiff multiple times as she wielded a large knife and threatened to kill them. Prior to the shooting, the officers had been attempting to help a social worker transport Plaintiff to a psychiatric detention facility for evaluation and treatment. Plaintiff's main claim is that the officers applied excessive force. Defendants have moved for summary judgment as to all claims. As explained below, the Court GRANTS Defendants' motion.

I. BACKGROUND

On August 5, 2008, Heath Hodge, a social worker, went to Conrad House [sic], a cooperative housing program for adults in need of mental health support in San Francisco, to check the status of Plaintiff's neighbor. Nisembaum Decl., Ex. A (dkt.45) at 10, 33-34.

While there, Hodge knocked on Plaintiff's door and said through the door that he was concerned about Plaintiff's health, and that he would return in a few days if she did not open the door. *Id.* at 33-34. Plaintiff did not respond. *Id.* at 39-40.

On August 7, 2008, Hodge returned to Conrad House to check Plaintiff's health. *Id.* at 55. Once there, Hodge knocked on Plaintiff's door, announced himself, explained that he wanted [sic] check in on her and that he would enter the room if she did not respond. *Id.* at 57-58. After hearing no response, Hodge, with the assistance of the property manager, opened Plaintiff's apartment door. *Id.* at 59.

Once inside, Hodge observed Plaintiff lying on her bed with a book resting on her face and then attempted to engage Plaintiff by asking her if she was okay. *Id.* at 59-60. After initially not responding, Plaintiff leaped out of her bed and yelled for Hodge to leave her room, threatening to kill him with a knife if he did not.[1] *Id.* at 61. Hodge left the room, told the other residents to leave the building, and then went to his car to retrieve a 5150 form. *Id.* 63.[2]

Hodge called the police to help him place Plaintiff under a 72-hour detention under section 5150. *Id.* at

---

[1] Hodge did not actually see Plaintiff with a knife.

[2] 5150 refers to California Welfare & Institutions Code section 5150, which sets forth the means of taking into custody "any person" when he or she, "as a result of a mental disorder, is a danger to others, or to himself or herself, or gravely disabled."

64. Shortly after the call, Officer Holder arrived at the Conrad House [sic] to assist Hodge. *Id.* at 66. Because Officer Holder had never before helped a social worker to effectuate a 5150 arrest, she called her street sergeant, Kimberly Reynolds, for help. Loebs Decl., Ex. B (dkt.40) at 58-59.

Upon arrival, Officer Reynolds spoke with Hodge, verified that Hodge had the authority to make such an arrest, and examined the 5150 form that Hodge had filled out. Keith Decl., Ex. B (Dkt.39) at 28. The 5150 form stated:

> Client has been without psychotropic meds times one and a half years. Has been presenting with increased symptoms for several weeks. Client has not been seen by the house counselor times two weeks. Housemates reported that client has been coming and going at odd hours and reportedly said she had stopped eating. It was also reported that client has been wearing the same clothes for several days. Writer conducted outreach to client and she was not responsive. Made no sound behind her closed door. Writer and property management keyed in for wellness check.
>
> Client, upon opening the door, [ ] was found lying in her bed with a book over her face, eyes open and was not responsive. Addressed client several times and she did not move or answer. Client then suddenly got up, threw the covers, and yelled at writer violently, "Get out of here! You don't have a

> warrant! I have a knife and I'll kill you if I have to!" Client then slammed her door and locked it behind her.

Loebs Decl., Ex. C at 21-22. Also on the form, Hodge checked the "gravely disabled" and "danger to herself or others" boxes to indicate the basis for the 5150 detention. *Id.* at 22. After speaking with Hodge and examining the 5150 form, Officer Reynolds decided to make contact with Plaintiff to verify that she met the criteria for detention under section 5150. Keith Decl., Ex. B at 29.

After giving Officer Reynolds a key to Plaintiff's room, Hodge led both officers to Plaintiff's apartment door, which was located at the end of a narrow "7" shaped hallway on the second floor. *Id.* at 30; *see* Loebs Decl., Ex. E-2 (photographs).[3] Once at the door, Officer Reynolds knocked and inserted the key into the door at the same time, told Plaintiff, "we are the police, we want to help," and then pushed open the door. Keith Decl., Ex. B at 30. When the door opened, Plaintiff jumped out of bed and screamed for the officers to leave her unit. *Id.* at 30-31. While moving toward the officers, Plaintiff picked up a large kitchen knife and threatened to kill the police officers. *Id.* at 31-33. The officers retreated backwards and Plaintiff closed the door. *Id.* at 31.

---

[3] The Court has attached photographs of the scene. The photographs depict rather cramped quarters. The open door in the photographs leads to Plaintiff's room. A small alcove is located next to Plaintiff's door.

Thereafter, the officers called for backup, drew their department-issued weapons and instructed Plaintiff to drop the knife, explaining that they were there to help her. Keith Decl., Ex. C at 7. Initially, Officer Reynolds attempted to force open the door while Officer Holder kept her gun and pepper spray aimed at the door. *Id.* After watching Officer Reynolds struggle, Officer Holder asked that they switch positions, handed Officer Reynolds her pepper spray and opened the door.[4] *Id.* at 10-11.

Plaintiff, standing about five to eight feet from the door, proceeded to move toward the officers with the knife in her hand. *Id.* As she moved closer, Plaintiff raised the knife and said that she was going to kill the officers. *Id.* Officer Reynolds fired a stream of pepper spray into Plaintiff's eyes but it had "absolutely no effect" on Plaintiff's forward movement. *Id.* at 11. According to Plaintiff, the officers shot her with pepper spray while she still had the knife in a raised position, as she made it to the door's threshold. Loebs Decl., Ex. G at 81. She asserts that the pepper spray blinded her and caused her to move into the hallway. *Id.*[5] Plaintiff turned towards Officer Holder, who had

---

[4] It is unclear whether Officer Holder forced open the door or whether Plaintiff opened it herself. *See* Loebs Decl., Ex. G at 72. The Court finds that it is immaterial who opened the door.

[5] The Court accepts this version of events as true. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (when deciding a summary judgment motion, a court must view the evidence in the light most favorable to the nonmoving party and draw all justifiable inferences in its favor). In both Plaintiff's

(Continued on following page)

her back toward the short end of the hallway, and continued to move toward Officer Holder with the knife raised in her hand. Keith Decl., Ex. C at 11. Plaintiff was close enough to strike Officer Holder with the knife. *Id.* at 16. Officer Holder testified that Plaintiff was so close to her that if she had extended her arm to properly aim her firearm, she would have been "well within" Plaintiff's striking distance. *Id.*

At this point, Officer Holder, with her back pressed against a wall, shot Plaintiff two to three times in the center mass area with her firearm. Loebs Decl., Ex. B (dkt.40) at 189-90. Plaintiff was about two to three feet from Officer Holder after the last shot. *Id.* After being shot, Plaintiff turned towards Officer Reynolds and took a step toward her with the knife still in her hand.[6] *Id.* at 190. Officer Reynolds then rapidly shot Plaintiff two to three times, the last shot striking Plaintiff in the face.[7] Keith Decl., Ex. B at 37. Officer Holder testified that Plaintiff was on the ground when Officer Reynolds fired the last shot.

---

account and the officers' accounts, Plaintiff was pepper-sprayed while advancing toward the officers with the knife, and continued to advance with the knife after she was pepper-sprayed.

[6] Officer Reynolds testified that she was not sure if Plaintiff completely turned towards her when she fired her weapon. Loebs Decl ., Ex. D at 208. However, Officer Reynolds testified that Plaintiff was yelling and attempting to assault her with the knife before she fired. *Id.*

[7] Officer Reynolds' first two shots struck Plaintiff in the center mass area. Keith Decl., Ex. B. at 37.

Loebs Decl., Ex. B at 192.[8] Officer Reynolds shot Plaintiff from a distance of about two to four feet. Nisembaum Decl., Ex. C at 211.

While on the ground, Plaintiff did not release the knife but instead extended the knife away from her body. Loebs Decl., Ex. D at 214-220. Plaintiff testified that she had no intention of dropping the knife even after she was shot. Loebs Decl., Ex. G at 106. Plaintiff admitted that she did not drop the knife when she fell to the ground and that the officers could have perceived her as still presenting a threat. *Id.* at 105. Later, another officer, Officer Zachos, arrived at the scene, rushed towards the Plaintiff and kicked the knife out of her hands, marking the end of the confrontation. Keith Decl., Ex. B at 63-64. Officer Zachos testified that when he arrived, Plaintiff was still gripping the knife and moving it within striking distance of the officers.[9] Loebs Decl., Ex. E at 47-48. Plaintiff survived.

---

[8] The Court notes that Officer Reynolds testified that Plaintiff was still standing when Officer Reynolds fired the last shot, Nisembaum Decl., Ex. C at 211, and that Plaintiff herself testified that she was "standing and then . . fell against the wall" when the last shot was fired, Loebs Decl., Ex. G at 117, but will assume that Plaintiff was on the ground, as this is the version of the facts most favorable to Plaintiff.

[9] Officer Zachos marked a photograph to illustrate how close Officer Holder, Officer Reynolds and Plaintiff were when he arrived at the scene. Loebs Decl., Ex. E-2 (photograph Ex. 124).

Subsequently, the San Francisco District Attorney prosecuted Plaintiff for assault with a deadly weapon, assault on a police officer with a deadly weapon and for making terrorist threats against Hodge. *See* Keith Decl., Ex. A. At trial, the jury acquitted Plaintiff of the terrorist threat charge but hung on the assault charges. *Id.* The District Attorney did not re-try the case.

On August 25, 2009, Plaintiff filed a complaint against Officer Reynolds, Officer Holder, San Francisco Police Chief Heather Fong, and the City and County of San Francisco, asserting causes of action under section 1983, the Americans with Disabilities Act ("ADA"), and California state law. *See generally* Compl. Defendants have moved for summary judgment as to all claims.

II. LEGAL STANDARD

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56© [sic]. A principal purpose of the summary judgment procedure is to isolate and dispose of factually unsupported claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). The burden is on the moving party to demonstrate that there is no genuine dispute with respect to any material fact and that it is entitled to judgment as a

matter of law. *Id.* at 323. A genuine issue of fact is one that could reasonably be resolved in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is "material" only if it could affect the outcome of the suit under the governing law. *Id.* at 248-49.

If the moving party does not satisfy its initial burden, the nonmoving party has no obligation to produce anything and summary judgment must be denied. *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102-03 (9th Cir. 2000). If, on the other hand, the moving party has satisfied its initial burden of production, then the nonmoving party may not rest upon mere allegations or denials of the adverse party's evidence, but instead must produce admissible evidence that shows there is a genuine issue of material fact for trial. *Id.* at 1103. The nonmoving party must "set out 'specific facts showing a genuine issue for trial.'" *Celotex,* 477 U.S. at 324-25 (quoting Fed. R. Civ. P. 56© [sic]). If the nonmoving party fails to make this showing, the moving party is entitled to judgment as a matter of law. *Id.* at 323.

When deciding a summary judgment motion, a court must view the evidence in the light most favorable to the nonmoving party and draw all justifiable inferences in its favor. *Anderson,* 477 U.S. at 255. However, it is not a court's task "to scour the record in search of a genuine issue of triable fact." *Keenan v. Allan,* 91 F.3d 1275, 1279 (9th Cir. 1996) (internal quotations omitted). Rather, a court is entitled to rely on the nonmoving party to identity with reasonable

particularity the evidence that precludes summary judgment. *See id.*

III. DISCUSSION

Defendants have moved for summary judgment as to all of Plaintiff's claims. Defendants' motion raises six issues: (1) whether collateral estoppel bars Plaintiff's arrest and malicious prosecution claims; (2) whether the officers' warrantless entry into Plaintiff's home falls within the Fourth Amendment's "emergency aid exception;" (3) whether the officers' use of deadly force against Plaintiff was lawful under the circumstances; (4) whether the officers' actions give rise to municipal liability; (5) whether the Defendants are liable under the ADA for arresting Plaintiff without first taking into account her mental disability; and (6) whether Plaintiff's state law claims are barred under a California immunity statute.

Defendants have also argued that qualified immunity applies to Plaintiff's section 1983 claims. Mot. (dkt.41) at 8. In determining whether qualified immunity applies, courts ask (1) whether the officer's conduct violated a constitutional right and (2), "if a violation occurred, whether the right was "'clearly established in light of the specific context of the case.'" *See Bryan v. MacPherson,* 630 F.3d 805 (9th Cir. 2010). This Court will use as a threshold inquiry "whether the facts that . plaintiff has shown make out a violation of a constitutional right." *See Pearson v. Callahan,* 555 U.S. 223, 129 S. Ct. 808,

816 (2009).[10] Because Defendants' actions did not violate the Constitution, the Court need not reach the question of whether a reasonable officer could have believed her conduct was lawful under the clearly established governing law. *See id.* at 815.[11]

A. Whether Collateral Estoppel Bars Plaintiff's Section 1983 False Arrest and Malicious Prosecution Claims

Plaintiff claims that Defendants falsely arrested and maliciously prosecuted her, thereby violating her constitutional rights under the Fourth Amendment. A finding of probable cause is a complete defense to false arrest and malicious prosecution claims. *See Pierson v. Ray,* 386 U.S. 547, 555 (1967); *Freeman v. City of Santa Ana,* 68 F.3d 1180, 1189 (9th Cir. 1995). A federal court must give a state-court judgment the same preclusive effect as the state of rendition. 12 U.S.C. § 1738. A judgment from a state criminal proceeding may have preclusive effect in a subsequent section 1983 suit. *See Allen v. McCurry,* 449 U.S. 90, 103-104 (1980) ("There is no reason to

---

[10] The Court recognizes that under *Pearson v. Callahan,* 555 U.S. 223, 129 S. Ct. 808, 818 (2009), the rigid two-step procedure announced in *Saucier v. Katz,* 533 U.S. 194 (2001) is "no longer . . mandatory," and the Court may use its discretion to decide which prong of qualified immunity analysis to address first.

[11] Of course, because the Court finds that no constitutional right was violated, the Court necessarily also finds that no clearly established right was violated.

believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all."). If state courts would preclude a party from relitigating the issue of probable cause, then he or she is also precluded in federal court provided that she had a "full and fair opportunity to litigate the issue in the prior proceeding." *See Haupt v. Dillard,* 17 F.3d 285, 289 (9th Cir. 1994).

The Supreme Court of California requires that the following factors be met for collateral estoppel to apply:

> First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, the issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.

Lucido v. Super. Ct., 51 Cal. 3d 335, 341 (1990). California criminal courts provide a full and fair opportunity to litigate the issue of probable cause at a preliminary hearing. *See McCutchen v. City of Montclair,* 73 Cal. App. 4th 1138, 1146-47 (1999) (noting that "a preliminary hearing is an adversary

judicial proceeding, designed to litigate the issue of probable cause to try the accused on criminal charges" and concluding that "absent a showing that evidence not available to the arresting officer was presented at the preliminary hearing, a finding of sufficiency of the evidence to require the defendant to stand trial is a finding of probable cause to arrest the defendant").

Here, the factors to apply collateral estoppel as to the probable cause issue have been satisfied. First, the probable cause inquiry Plaintiff asks this Court to make would be identical to that already made by the state trial court at Plaintiff's preliminary hearing. *See McCutchen*, 73 Cal. App. 4th at 1146. Second, Plaintiff does not dispute that probable cause was actually litigated and the trial record indicates that the magistrate judge made express probable cause findings. *See* Keith Decl., Ex. A. Third, probable cause was necessarily decided because, but for that determination, Plaintiff would not have stood trial. *See Haupt*, 17 F.3d at 289. Fourth, California courts, as a matter of California law, have ruled that "a finding of probable cause to hold [a] defendant over for trial is a final judgment on the merits for purposes of collateral estoppel." *McCutchen*, 73 Cal. App. 4th at 1146. Fifth, Plaintiff was a party to the previous proceeding as the accused. Lastly, California courts presume that a preliminary hearing provides a defendant with a full and fair opportunity to litigate probable cause, *Id.* at 1146-47, and Plaintiff has not challenged the fairness of her preliminary hearing in any respect.

The Court therefore finds that collateral estoppel prohibits Plaintiff from relitigating whether probable cause existed for her arrest and subsequent prosecution. As such, Plaintiff's false arrest and malicious prosecution claims fail as a matter of law, and Defendants' motion is granted as to those claims.[12]

B. Whether Officers Reynolds and Holder Lawfully Entered Plaintiff's Home

Plaintiff claims that Defendants' warrantless entry into her home violated the Fourth Amendment. Compl. ¶¶ 37-54. "It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006) (internal citations and quotations omitted). "Nevertheless, because the ultimate touchstone of the Fourth Amendment is reasonableness, the warrant requirement is subject to certain exceptions." *Id.* (internal citations and quotations omitted). "[W]arrants are generally required to search a person's home or his person unless the exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively

---

[12] Defendants also argue that the undisputed facts demonstrate that there was probable cause to both arrest and prosecute Plaintiff. Plaintiff's threats toward Hodge and the officers plainly demonstrate that probable cause existed to both arrest and prosecute her.

reasonable under the Fourth Amendment." *Id.* (internal citations and quotations omitted).

One exception to the Fourth Amendment's warrant requirement is the "emergency aid exception." *Huff v. City of Burbank,* 632 F.3d 539, 548 (9th Cir. 2011); *Hopkins v. Bonvicino,* 573 F.3d 752, 763 (9th Cir. 2009). Under this exception, "law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." *Michigan v. Fisher,* ___ U.S. ___, ___, 130 S. Ct. 546, 548 (2009). This exception "does not depend on the officers' subjective intent or seriousness of any crime they are investigating when the emergency arises." *Id.* "It requires only an objectively reasonable basis for believing that a person within [the house] is in need of immediate aid." *Id.* (internal citations and quotations omitted).

Here, Officers Reynolds and Holder had an objectively reasonable basis for believing that Plaintiff needed immediate medical assistance. Hodge, a mental health professional, requested police assistance to detain Plaintiff pursuant to California law. Officer Reynolds spoke directly with Hodge about Plaintiff's condition and examined the 5150 form that he prepared. The 5150 form stated that Plaintiff: (1) stopped taking her psychotropic medication for over a year; (2) manifested symptoms of mental illness for the last few weeks; (3) had not been seen by her house counselor for the last two weeks; (4) told housemates that she no longer needed to eat; (5) reportedly was

wearing the same clothes for the last several days; and (6) threatened to kill Hodge with a knife at the last wellness check. Hodge also checked the "gravely disabled," and "danger to herself and others" boxes on the 5150 form to indicate the basis for the detention. The officers entered Plaintiff's home after gathering this information.

Because Hodge, a mental health professional, was a reliable source and the facts articulated by him in the 5150 form strongly suggested that Plaintiff was "gravely disabled," the officers had an objectively reasonable basis for believing that Plaintiff was in need of immediate aid. *See U.S. v. Black,* 482 F.3d 1035, 1040 (9th Cir. 2007) ("[e]rring on the side of caution is exactly what we expect of conscientious police officers" during "a 'welfare search' where rescue is the objective, rather than a search for crime" [and] "[courts] should not second-guess the officers objectively reasonable decision in such a case"). As such, the officers' warrantless entry into Plaintiff's home did not offend the Fourth Amendment. *See Duarte v. Begrin,* 299 Fed. Appx. 711 (9th Cir. 2008) (officers' warrantless entry into plaintiff's home pursuant to section 5150 fell within the Fourth Amendment's exigent circumstances exception).

The Court notes that in her Opposition and at the motion hearing, Plaintiff's counsel appeared to argue that the [sic] it was the second entry into Plaintiff's room that violated the Fourth Amendment. *See* Opp'n at 17. Such a contention is without merit. Because the initial entry into the home was lawful,

the second entry, on these facts, was also lawful. The emergency that justified the initial entry did not evaporate simply because the officers stepped out of the room. *See, e.g., Michigan v. Tyler,* 436 U.S. 499, 510-12 (1978); *Fisher v. City of San Jose,* 558 F.3d 1069, 1082 (9th Cir. 2009). Moreover, Plaintiff's threats against the officers and her advancing toward them with a raised knife gave rise to an additional basis for their entry. Re-entry after an officer's retreat to secure her own safety does not create a new constitutional violation. *See People v. Hamilton,* 105 Cal. App. 3d 113, 118 (1980). In addition, as in *Black,* 482 F.3d at 1040, "[t]his is a case where the police would be harshly criticized had they not investigated." When Plaintiff closed the door on the officers, they had no way of knowing whether she might escape through a back window or fire escape, whether she might hurt herself, or whether there was anyone else in her room whom she might hurt. Though, at the motion hearing, Plaintiff's counsel was dismissive of the notion that Plaintiff posed any danger once she was behind a closed door, Hodge had checked the "gravely disabled" and "danger to herself or others" boxes to indicate the basis for the 5150 detention. Loebs Decl., Ex. C at 22. It was objectively reasonable to believe that Plaintiff needed immediate medical assistance.

Accordingly, the Court grants summary judgment in favor of Defendants as to all of Plaintiff's unlawful entry claims.

C. Whether Officers Reynolds and Holder Used Excessive Force When They Shot Plaintiff

Plaintiff claims that Officer Reynolds's and Officer Holder's use of force was excessive. It is axiomatic "that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical [force]." *Graham v. Connor,* 490 U.S. 386, 396 (1989). "[*A*]*ll* claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Id.* (emphasis in original). Because the reasonableness inquiry "under the Fourth Amendment is not capable of precise definition or mechanical application," a court must pay "careful attention to the facts and circumstances of each particular case, including [1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting or attempting to evade arrest by flight." *Id.* at 396 (internal citations omitted).

"The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with 20/20 vision of hindsight." *Id.* (citations omitted). "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense,

uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Id.* at 396-97 (citations omitted).

Here, the officers' use of force was objectively reasonable under the Fourth Amendment for two reasons.

First, it is undisputed that Plaintiff threatened to kill the officers with a knife. This threat gave the officers the right to arrest Plaintiff and to use some degree of force, even though she was mentally ill. *See Gregory v. County of Maui,* 523 F.3d 1103, 1106-07 (9th Cir. 2008) (use of force on man who "acted in a bizarre manner throughout the confrontation," armed only with a pen, was reasonable even though use of force resulted in death); *Reynolds v. County of San Diego,* 84 F.3d 1162, 1168 (9th Cir. 1996) (deadly force was reasonable where a suspect, who had been behaving erratically, swung knife at an officer), *overruled on other grounds by Acri v. Varian Assoc., Inc.,* 114 F.3d 999, 1000 (9th Cir. 1997).

Second, the totality of circumstances demonstrate that it was reasonable for the officers to shoot Plaintiff multiple times. Plaintiff threatened to kill the officers, a severe crime. *See* Cal. P.C. § 245; *Graham,* 490 U.S. at 396. After threatening to kill them, Plaintiff advanced toward the officers in a tight hallway with a large knife raised. It is undisputed that Plaintiff was close enough to strike either officer with a knife. In such circumstances, it was objectively reasonable for the officers to believe that Plaintiff

posed an immediate risk to their safety. *See Graham,* 490 U.S. at 396; *Smith v. City of Hemet,* 394, F.3d 689, 702 (9th Cir. 2005) ("most important single element" is "whether the suspect poses an immediate threat to the safety of the officers or others"). It is also undisputed that Plaintiff actively resisted arrest. *See Graham,* 490 U.S. at 396. Plaintiff testified that she had no intention of dropping the knife even after she was shot. Loebs Decl., Ex. G at 106.

There are not "two [separate] tracks of excessive force analysis, one for the mentally ill and one for serious criminals," *see Bryan,* 630 F.3d 829, but a court must consider an individual's mental illness in determining the reasonableness of the force employed, *see Drummond v. City of Anaheim,* 343 F.3d 1052, 1058 n.6 (9th. Cir. 2003). Here, that Plaintiff was mentally ill, was acting irrationally (in threatening to kill the officers and advancing toward them with a raised knife), and was not subdued by the less forceful use of pepper spray, made the situation all the more uncertain and dangerous to the officers. *See Robbins v. City of Hanford,* No. CIV F 04-6672 AWI SMS, 2006 WL 1716220, at *15 (E.D. Cal. June 19, 2006) (distinguishing cases involving use of force against mentally ill suspects who were compliant or not threatening others).

The undisputed facts with respect to each shooting further reveal the reasonableness of the officers' use of force. Officer Holder shot Plaintiff while she had her back against a wall with Plaintiff closing in on her with a knife in hand. Trapped and faced with

an armed individual in close quarters, Officer Holder had no choice but to shoot Plaintiff in order to protect herself. *See Barber v. City of Santa Rosa,* No. C 08-5649 MMC, 2010 WL 5069868, at *5-6 (N.D. Cal. Dec. 7, 2010) (holding that shooting a mentally ill man armed with a knife who threatened to kill the officers was not unreasonable); *Robbins,* 2006 WL 1716220, at *15-16 (E.D. Cal. June 19, 2006) (officer shooting mentally ill person who cornered him in a room with a knife while trying to effectuate a 5150 detention was reasonable). That Officer Holder applied deadly force only after the use of pepper spray on Plaintiff was ineffective further demonstrates the reasonableness of her actions.

It [sic] also undisputed that Plaintiff did not fall to the ground after being shot by Officer Holder, but instead moved, with a knife still in her hand, toward Officer Reynolds. Officer Reynolds, perceiving Plaintiff as a threat to herself and Officer Holder, also shot Plaintiff two to three times. Assuming that Officer Reynolds fired her last shot at Plaintiff while she was on the ground, Officer Reynolds' actions were still objectively reasonable. Officer Reynolds fired at Plaintiff in rapid succession at close quarters in a tense, uncertain and rapidly evolving set of circumstances, making it difficult to discern when to stop shooting. In the context of an excessive force claim, the First Circuit stated:

> It may well be true that [the officer] continued to fire as [plaintiff] fell to or lay on the ground. But it is clear from the very brief

> time that elapsed that she made a split-second judgment in responding to an imminent threat and fired a fusillade in an emergency situation. [The officer's] action cannot be found unreasonable because she may have failed to perfectly calibrate the amount of force required to protect herself.

Berube v. Conley, 506 F.3d 79, 85 (1st Cir. 2007). Plaintiff admits that she was still clutching the knife as she laid on the ground and that she had no intention of releasing it. While on the ground, Plaintiff continued to extend the knife away from her body and within striking distance of the officers.

Even in hindsight, no argument can be made that Officer Reynolds used excessive force by shooting Plaintiff after she had already been shot by Officer Holder. Officer Reynolds's actions were objectively reasonable given the situation she faced: a mentally ill person wielding a knife, threatening to kill her and her partner, advancing on her in the confines of a small hallway to the point of being within striking distance. Officer Reynolds made a split-second judgment, the likes of which the Supreme Court has instructed lowers [sic] courts not to second-guess. *See Graham*, 490 U.S. at 397 ("The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation."). Officer Reynolds used deadly force only after she found that

pepper spray was not enough force to contain the situation, and that there remained a continuing and credible threat to the officers' safety. That threat is not undermined by the use of hindsight. Indeed, the testimony of the officers and of Plaintiff, and the photographs attached hereto, confirm the officers' perception of a dire and escalating threat, and *no evidence* refutes the reasonableness of the officers' conduct.

Accordingly, the Court finds that the officers' use of force was objectively reasonable under the circumstances. As such, Defendants' motion for summary judgment as to Plaintiff's excessive force claims is granted.

D. Municipal Liability

Plaintiff asserts that the City of San Francisco and Police Chief Fong[13] violated her constitutional rights by failing to properly train the City's police officers. Though a municipality may face liability for failure to adequately train its officers under section 1983, that liability "is contingent on a violation of constitutional rights" by an individual officer. *Scott v. Henrich,* 39 F.3d 912, 916 (9th Cir. 1994). "If there was no constitutional violation of [the plaintiff's] rights, there is no basis for finding the officers inadequately trained." *Long v. City and Cnty. of Honolulu,*

---

[13] There is no allegation that Fong participated personally in this incident.

511 F.3d 901, 907 (9th Cir. 2007) (internal citations and quotations omitted). Because, as discussed above, the officers' conduct did not offend the Constitution, Plaintiff's municipal liability claims necessarily fail.[14]

Accordingly, the Court grants summary judgment in favor of Defendants as to Plaintiff's municipal liability claims.

E. Americans with Disabilities Act Claim

Plaintiff alleges that Defendants discriminated against her, in violation of the ADA, by arresting her in a manner that did not take into account her mental disability. Compl. ¶¶ 55-59. Furthermore, Plaintiff alleges that Defendants' conduct excluded her from participating in City programs and denied her access to public benefits. *Id.* The ADA prohibits a public entity from discriminating against an individual on the basis of a qualified disability. *See* 42 U.S.C § 12132. The Ninth Circuit has ruled that section 12132 does not permit suits against private individuals. *See Vinson v. Thomas,* 288 F.3d 1145, 1156 (9th Cir. 2002). Plaintiff cannot circumvent this restriction by bringing her claims under section 1983. *Id.*

Under the ADA, a disabled plaintiff can state a claim if he can show that, because of his disability, he was either "excluded from participation in or denied

---

[14] Nor has Plaintiff pointed to evidence of a policy of deliberate indifference.

benefits of the services, programs, or activities of a public entity," or "was otherwise subjected to discrimination by any such entity." *Hainze v. Richards,* 207 F.3d 795, 799 (5th Cir. 2000) (internal quotations omitted). In *Hainze,* the court held that section 12132 does not permit a cause of action based on an "officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life." *Id.* at 801. The court went on to note:

> To require the officers to factor in whether their actions are going to comply with the ADA, in the presence of exigent circumstances and prior to securing the safety of themselves, other officers, and any nearby civilians, would pose an unnecessary risk to innocents. While the purpose of the ADA is to prevent the discrimination of disabled individuals, we do not think Congress intended that the fulfillment of that objective be attained at the expense of the general public.

Id.

The Firth [sic] Circuit's reasoning is persuasive.[15] Here, the officers attempted to detain a violent,

---

[15] The parties do not cite to any Ninth Circuit authority on this issue, and the Court has found none. *But see Schreiner v. City of Gresham,* 681 F. Supp. 2d 1270, 1279 (D. Or. 2010) (allowing ADA claim to go forward where "the situation was

(Continued on following page)

mentally disabled individual under exigent circumstances. It would be unreasonable to ask officers, in such a situation, to first determine whether their actions would comply with the ADA before protecting themselves and others.

Plaintiff has asserted claims against all Defendants under the ADA. Because section 12132 does not permit claims against individuals, the claims against the officers fail as a matter of law. Furthermore, because Plaintiff cannot state a claim against the City for actions taken by the officers prior to her arrest, the claim against the City also fails.

Accordingly, the Court grants summary judgment in favor of the Defendants as to Plaintiff's ADA claims.

F. State Law Claims

Plaintiff has also asserted various state law claims based on the same facts that make up her federal claims. Compl. ¶¶ 60-74. Under California law, an individual authorized to detain a person under section 5150 shall not be held criminally or civilly liable for exercising this authority in accordance with the law. Cal. Welf. & Inst. Code § 5278.

---

under control and rather than inflicting pain upon her, [the officer] should have consulted with paramedics and administered medical treatment"). The Court finds that unlike in *Schreiner*, the situation here was not "under control" when the shots were fired.

Because, as discussed above, the officers – individuals authorized to detain a person under section 5150 – lawfully arrested, searched and used reasonable force under the circumstances, section 5278 bars all of Plaintiff's state law claims. *See Bias v. Moynihan*, 508 F.3d 1212, 1221 (9th Cir. 2007).

Accordingly, the Court grants summary judgment in favor of Defendants as to all of Plaintiff's state law claims.

IV. CONCLUSION

For the foregoing reasons, the Court GRANTS summary judgment in favor of Defendants as to all of Plaintiff's claims. As a matter of law, Plaintiff's false arrest and malicious prosecution claims fail under principles of collateral estoppel. The officers' warrantless entry into Plaintiff's home falls within the emergency aid exception to the Fourth Amendment's warrant requirement. Plaintiff threatened to kill the officers, while advancing on them, with a knife in her hand; the officers' use of force was reasonable under the circumstances. Plaintiff's municipal liability claims fail because the officers did not violate any of her constitutional rights. Plaintiff's ADA claim fails, as a matter of law, because section 12132 does not expose police officers to liability under the ADA in these circumstances. Lastly, Plaintiff's state law claims fail because California law

immunizes individuals from all claims arising out of the lawful detention of a person under section 5150.

IT IS SO ORDERED.

Dated: May 6, 2011

/s/
CHARLES R. BREYER
UNITED STATES
DISTRICT JUDGE

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
OCT 13 2014
OFFICE OF THE CLERK

No. 13-1412

In the Supreme Court of the United States

CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, *ET AL.*,

Petitioners,

v.

TERESA SHEEHAN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

JILL BOWMAN
STOEL RIVES LLP
600 University Street
Suite 3600
Seattle, WA 98101
jdbowman@stoel.com
206-624-0900

BEN NISENBAUM
LAW OFFICES OF
JOHN L. BURRIS
7677 Oakport Street
Suite 1120
Oakland, CA 94621
bnisenbaum@johnburrislaw.com
510-839-5200

LEONARD J. FELDMAN
Counsel of Record
PETERSON WAMPOLD ROSATO
LUNA KNOPP
1501 Fourth Avenue
Suite 2800
Seattle, WA 98101
Feldman@pwrlk.com
206-624-6800

Counsel for Respondents

Becker Gallagher Cincinnati, OH Washington, D.C. 800.890.5001

QUESTIONS PRESENTED

This case involves a near fatal tragedy in which police officers pepper sprayed and repeatedly shot Teresa Sheehan, a woman who they knew was mentally ill and in need of medical evaluation and treatment. The questions presented are:

1. Whether the Ninth Circuit correctly held – consistent with other circuits that have addressed the issue – that the reasonable accommodation requirement of Title II of the Americans with Disabilities Act applies to law enforcement activities, including arrests.

2. Whether the Ninth Circuit correctly held that fact issues preclude summary judgment regarding Ms. Sheehan's claim that Petitioners violated the reasonable accommodation requirement when police officers drew their guns and forced their way back into Ms. Sheehan's room without taking her mental illness into account and without employing tactics that would have been likely to resolve the situation without injuring her or others.

3. Whether the Ninth Circuit correctly held that fact issues preclude summary judgment regarding Petitioners' qualified immunity defense because there is evidence that it was unreasonable for police officers to draw their guns and force their way back into Ms. Sheehan's room without making any attempt to deescalate the situation.

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 9

I. The Ninth Circuit's ADA Rulings Do Not Warrant Review. 9

A. The Ninth Circuit Correctly Held – Consistent With Other Circuits That Have Addressed The Issue – That The Reasonable Accommodation Requirement Of Title II Of The ADA Applies To Law Enforcement Activities, Including Arrests. 9

B. The Ninth Circuit Correctly Found That Fact Issues Preclude Summary Judgment Regarding Ms. Sheehan's Claim That Petitioners Violated The ADA When Police Officers Drew Their Guns And Forced Their Way Back Into Ms. Sheehan's Room Without Taking Her Mental Illness Into Account And Without Employing Tactics That Would Have Been Likely To Resolve The Situation Without Injuring Her Or Others. 12

II. The Ninth Circuit's Qualified Immunity Ruling Also Does Not Warrant Review. 16

III. This Case Is A Poor Vehicle For Reviewing The Claimed ADA And Qualified Immunity Issues. 23

IV There Is No Reason To Hold The Petition For *Plumhoff v. Rickard* Because The Court's Opinion In *Plumhoff* Is Not Controlling Here. 27

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

Cases

Alexander v. City & County of San Francisco,
29 F.3d 1355 (9th Cir. 1994) 22, 23

Bahl v. County of Ramsey,
695 F.3d 778 (8th Cir. 2012) 12

Bircoll v. Miami-Dade Cnty.,
480 F.3d 1072 (11th Cir. 2007).....10, 11, 13

Brosseau v. Haugen,
543 U.S. 194 (2004) (per curiam) 28

Deorle v. Rutherford,
272 F.3d 1272 (9th Cir. 2001).....22, 23

Waller ex rel. Estate of Hunt v. City of Danville, Va.,
556 F.3d 171 (4th Cir. 2009) 14

Folkerts v. City of Waverly, Iowa,
707 F.3d 975 (8th Cir. 2013) 10, 11

Gohier v. Enright,
186 F.3d 1216 (10th Cir. 1999).....10, 11

Gorman v. Bartch,
152 F.3d 907 (8th Cir. 1998) 10, 11

Graham v. Connor,
490 U.S. 386 (1989).....17, 22, 23

Hainze v. Richards,
207 F.3d 795 (5th Cir. 2000) 10, 11

Hernandez v. City of Pomona,
207 P.3d 506 (Cal. 2009).....21, 22

Olmstead v. L.C. ex rel. Zimring,
527 U.S. 581 (1999)..... 12

Pa. Dep't of Corr. v. Yeskey,
524 U.S. 206 (1998).....10, 11

Plumhoff v. Rickard,
134 S. Ct. 2012 (2014).....17, 27, 28

Roberts v. City of Omaha,
723 F.3d 966 (8th Cir. 2013) 10, 11

Ryburn v. Huff,
132 S. Ct. 987 (2012) (per curiam) 20, 21

Saucier v. Katz,
533 U.S. 194 (2001)..... 16

Scott v. Harris,
550 U.S. 372 (2007).....20, 21

Seremeth v. Bd. of Cnty. Comm'rs Frederick Cnty.,
673 F.3d 333 (4th Cir. 2012) 10, 11, 14

Stanton v. Sims,
134 S. Ct. 3 (2013) (per curiam) 20, 21

Tennessee v. Garner,
471 U.S. 1 (1985).....17, 22

Tennessee v. Lane,
541 U.S. 509 (2004)..... 12

Thompson v. Davis,
295 F.3d 890 (9th Cir. 2002) 10, 11

Tolan v. Cotton,
134 S. Ct. 1861 (2014).....16, 17, 19, 28

Tucker v. Tennessee,
539 F.3d 526 (6th Cir. 2008) 13

Warden, Maryland Penitentiary v. Hayden,
387 U.S. 294 (1967).....20, 21

Statutes

42 U.S.C. § 12131, *et seq.*..... 9

Cal. Welf. & Inst. Code § 5008(h)(1)(A)
(West 2008) 2

Cal. Welf. & Inst. Code § 5150.....2, 3, 4, 24

Cal. Welf. & Inst. Code § 5150(a)
(West 2008) 2

California Civil Code § 52.1..... 7

California Penal Code § 835a 21

Regulations

28 C.F.R. § 35.130(b)(7) 12

Other Authorities

Disability Rights Online News, Department Undertakes Major Initiative to Educate State and Local Law Enforcement Agencies About the ADA (June 2006), *available at* http://www.ada.gov/newsltr0606.htm 27

The Police Chief – the Professional Voice of Law Enforcement, Title II of the Americans with Disabilities Act: The Potential for Police Liability and Ways to Avoid It (Sept. 2006), *available at* http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=1004&issue_id=92006 27

STATEMENT OF THE CASE

1. This case arose out of a social worker's nonemergency call to the San Francisco Police Department requesting assistance in transporting respondent Teresa Sheehan, a mentally ill woman, to a hospital. The social worker, Heath Hodge, believed that Ms. Sheehan needed to be transported to an emergency room for psychiatric evaluation and treatment. Ms. Sheehan suffered from schizoaffective disorder.

At the time of the call, Ms. Sheehan was in her mid-50s, had no criminal record, and lived in a group home for persons dealing with mental illness. She and the other residents of the home shared common areas, such as the kitchen and living room, but lived independently in private rooms. Mr. Hodge supervised the counseling staff who worked at the home.

On August 7, 2008, Mr. Hodge went to Ms. Sheehan's residence to perform a welfare check. He was concerned about Ms. Sheehan because he knew she had not been taking her medications and he had received reports of odd behavior. When she did not respond to his knock on her door, he used a key to open the door and enter her room.

Upon entering Ms. Sheehan's room, Mr. Hodge found her lying on her bed, staring, with a book resting on her face. Although she did not initially respond to his questions, after a while, she jumped out of bed and yelled at him to get out of her room

and leave her alone. She threatened him, stating that she had a knife.

Although Mr. Hodge did not see a knife, he cleared the building of the other residents and filled out an application under California Welfare & Institutions Code § 5150 for Ms. Sheehan's involuntary commitment. Section 5150 authorizes mental health professionals and certain others to initiate a temporary detention of persons who are a danger to themselves or others or are "gravely disabled." Cal. Welf. & Inst. Code § 5150(a).[1]

In the narrative portion of the Section 5150 application he prepared, Mr. Hodge wrote:

> Client has been without psychotropic meds times one and a half years. Has been presenting with increased symptoms for several weeks. Client has not been seen by the

---

[1] In 2008, Section 5150(a) stated in pertinent part: "When any person, as a result of mental disorder, is a danger to others, or to himself or herself, or gravely disabled, a peace officer, member of the attending staff, as defined by regulation, of an evaluation facility designated by the county, or other professional person designated by the county may, upon probable cause, take, or cause to be taken, the person into custody and place him or her in a facility designated by the county and approved by the State Department of Mental Health as a facility for 72-hour treatment and evaluation." Cal. Welf. & Inst. Code § 5150(a) (West 2008). The statute also defined the phrase "gravely disabled" as "[a] condition in which a person, as a result of a mental disorder, is unable to provide for his or her basic personal needs for food, clothing, or shelter." *Id.* § 5008(h)(1)(A) (West 2008).

> house counselor times two weeks. Housemates reported that client has been coming and going at odd hours and reportedly said she had stopped eating. It was also reported that client has been wearing the same clothes for several days. Writer conducted outreach to client and she was not responsive. Made no sound behind her closed door. Writer and property management keyed in for wellness check.
>
> Client, upon opening the door, [...] was found lying in her bed with a book over her face, eyes open and was not responsive. Addressed client several times and she did not move or answer. Client then suddenly got up, threw the covers, and yelled at writer violently, "Get out of here! You don't have a warrant! I have a knife and I'll kill you if I have to!" Client then slammed her door and locked it behind her.

After the narrative, Mr. Hodge checked boxes indicating he believed that Ms. Sheehan was a danger to others and was gravely disabled. He did not check the box to indicate that Ms. Sheehan was a danger to herself.

After Mr. Hodge completed the Section 5150 application, he telephoned the police for assistance in transporting Ms. Sheehan to the hospital. He called the police department's nonemergency number because he did not believe there was any imminent risk that Ms. Sheehan would harm herself or that she would leave her room to harm anyone else.

Officer Katherine Holder responded to the call. She was soon joined by Sergeant Kimberly Reynolds. The automated radio dispatch system told the officers: "Social worker just went inside to check on his patient, subject is known to make violent threats, told reporting party to get out or she'll knife him (no weapon seen)//Name is Teresa Sheehan/Eurasion, early 50's, wearing striped shirt/pants."

Officer Holder and Sergeant Reynolds talked with Mr. Hodge outside the group home. Mr. Hodge told them that Ms. Sheehan had been off her medication for about a year and a half, that she was not taking care of herself, and that she had threatened to stab him when he went into her room to check on her. He showed them his completed Section 5150 application and told them that there was no one else in the building. He did not tell them that Ms. Sheehan was suicidal or give them any reason to believe Ms. Sheehan was likely to injure herself.

Although Sergeant Reynolds understood that Mr. Hodge was authorized to seek a detention under Section 5150, she believed it was her responsibility to assess Ms. Sheehan to confirm that the detention criteria were met. To do so, the officers entered the group home and climbed a flight of stairs to the second floor where Ms. Sheehan's room was at the end of a hall. Mr. Hodge accompanied the officers as they walked to Ms. Sheehan's room.

When they arrived at Ms. Sheehan's room, the officers knocked on the closed door and announced that the police were there to help her. Using the key supplied by Mr. Hodge, the officers opened the door. Ms. Sheehan rose up from her bed, grabbed a bread knife from a nearby plate, and started walking toward the officers. She told them she did not want their help and threatened to kill them if they came near her. She yelled at them to go away and leave her alone.

The officers drew their guns and retreated. Ms. Sheehan shut the door. Out in the hallway, the officers asked Mr. Hodge whether they could get into Ms. Sheehan's room from the back. Mr. Hodge informed the officers that other than the door to the hall, the only way into Ms. Sheehan's second-floor room was through a window, which would require a ladder.

The officers called for backup and told Mr. Hodge to go downstairs and open the front door to let the additional officers into the building. But then, without giving any thought to Ms. Sheehan's disability, and without waiting for the arrival of the less-than-lethal force unit that was en route or making any attempt to deescalate the situation, Sergeant Reynolds and Officer Holder decided to enter Ms. Sheehan's room.

With their guns drawn, and without any plan as to what they would do when they got into the room, the officers tried to break down the door. Officer Holder kicked it several times and then used her shoulder to try to force it open. Sergeant

Reynolds stood behind her with her pepper spray in one hand and her gun in the other.

As soon as the door opened, Ms. Sheehan stepped forward holding her bread knife. Sergeant Reynolds responded immediately by shooting pepper spray into her face. Ms. Sheehan screamed that the officers were blinding her and she could not see. It was approximately at this time that the less-than-lethal force unit arrived. One of those officers was about to pull his nonlethal weapon from the trunk of his car when Officer Holder and Sergeant Reynolds shot Ms. Sheehan five times, at point-blank range. With wounds in her torso and her left arm, Ms. Sheehan slid to the ground. Sergeant Reynolds then shot her in the face. She was on the floor when another officer arrived and kicked the knife out of her hand.

Remarkably, Ms. Sheehan survived the shooting. After she recovered, she was prosecuted for two counts of assault with a deadly weapon, two counts of assaulting a police officer with a deadly weapon, and one count of making criminal threats against Mr. Hodge. The jury hung on all of the assault counts and acquitted her on the criminal threat count. The city chose not to retry her.

2. Ms. Sheehan filed suit against the City and County of San Francisco, Police Chief Heather Fong, Sergeant Reynolds, and Officer Holder, alleging violations of her Fourth Amendment rights against unreasonable search and seizure, including a warrantless search and seizure and use of excessive force. She also alleged state law tort

claims, violation of California Civil Code § 52.1, and violation of her rights under the Americans with Disabilities Act ("ADA"). The last claim was based on her assertion that the police failed to reasonably accommodate her disability when they forced their way back into her room without taking her mental illness into account and without employing tactics that would have been likely to resolve the situation without injury to her or others.

Petitioners subsequently filed a motion for summary judgment seeking to dismiss all of Ms. Sheehan's claims. In response, Ms. Sheehan submitted an expert witness report by Lou Reiter, a former deputy chief of the Los Angeles Police Department, disputing the reasonableness of the police officers' actions. Mr. Reiter described general police practices for dealing with persons who are mentally ill or emotionally disturbed, explaining that officers are trained not to unreasonably agitate or excite the person, to contain the person, to respect the person's comfort zone, to use nonthreatening communications, and to employ the passage of time to their advantage.

Mr. Reiter deemed the officers' second entry into Sheehan's room tactically unreasonable under the foregoing policies. In his view, the officers should have "elected to relocate to a safer tactical position, call for special units/equipment, and determine the propriety of seeking a warrant." App. 27-28 (ellipsis in original). Mr. Reiter also stated that the officers knew "that other resources were en-route to their call for backup" and concluded that their "conduct exacerbated the

confrontation, rather than [sic] any effort to [defuse] the agitation." App. 28 (brackets in original). Despite that detailed report, the district court granted Petitioners' motion for summary judgment. App. 55-81.

3. The Ninth Circuit affirmed the judgment in part and vacated it in part in a divided opinion. App. 1-48. Relevant here, the panel majority (Judges John Noonan and Raymond Fisher) found triable issues of fact as to whether the officers' second entry into Ms. Sheehan's room violated the Fourth Amendment: "In view of Reiter's report, the officers' training and the totality of the circumstances – viewing the facts favorably to Sheehan as we must – we conclude that a reasonable jury could find that the officers' decision to force a confrontation with Sheehan was objectively unreasonable." App. 28.

The panel majority similarly held that fact issues precluded summary judgment regarding Petitioners' qualified immunity defense. The panel majority noted: "If there was no pressing need to rush in, and every reason to expect that doing so would result in Sheehan's death or serious injury, then any reasonable officer would have known that this use of force was excessive." App. 33. It then held: "The facts ... are disputed, and it would be premature to hold at this stage of the proceedings that the officers are – as a matter of law – entitled to qualified immunity." App. 36.

Finally, the panel majority likewise rejected Petitioners' arguments regarding ADA liability. It

first held – consistent with other circuits that have addressed the issue – that the reasonable accommodation requirement of Title II of the ADA applies to law enforcement activities, including arrests. App. 43. It then recognized that "reasonableness of an accommodation is ordinarily a question of fact" and found such fact issues because "[a] reasonable jury ... could find that the situation had been defused sufficiently, following the initial retreat from Sheehan's room, to afford the officers an opportunity to wait for backup and to employ less confrontational tactics, including the accommodations that Sheehan asserts were necessary." App. 45.

Judge Susan Graber dissented with respect to the qualified immunity ruling on Ms. Sheehan's excessive force claim, but concurred with the remainder of the opinion. App. 48-54.

REASONS FOR DENYING THE PETITION

I. The Ninth Circuit's ADA Rulings Do Not Warrant Review.

A. The Ninth Circuit Correctly Held – Consistent With Other Circuits That Have Addressed The Issue – That The Reasonable Accommodation Requirement Of Title II Of The ADA Applies To Law Enforcement Activities, Including Arrests.

The panel majority ruled, and Judge Graber agreed, that Title II of the ADA (42 U.S.C. § 12131,

et seq.) applies to arrests. App. 43, 48. Contrary to Petitioners' argument that the circuits are in conflict on this question, the court's unanimous holding is entirely consistent with the many circuit court decisions holding that Title II applies to law enforcement activities, including arrests. *See Folkerts v. City of Waverly, Iowa,* 707 F.3d 975, 983 (8th Cir. 2013) ("Title II of the ADA applies to an arrestee's post-*Miranda* interview."); *Roberts v. City of Omaha,* 723 F.3d 966, 973 (8th Cir. 2013) ("[T]he ADA ... appl[ies] to law enforcement officers taking disabled suspects into custody."); *Seremeth v. Bd. of Cnty. Comm'rs Frederick Cnty.*, 673 F.3d 333, 337 (4th Cir. 2012) (Title II applies to police investigations); *Bircoll v. Miami-Dade Cnty.*, 480 F.3d 1072, 1085-86 (11th Cir. 2007) (rejecting argument that Title II does not apply to DUI arrests); *Thompson v. Davis,* 295 F.3d 890, 894, 897 (9th Cir. 2002) (rejecting argument that Title II does not apply to parole decisions); *Gohier v. Enright,* 186 F.3d 1216, 1221 (10th Cir. 1999) ("[A] broad rule categorically excluding arrests from the scope of Title II ... is not the law."); *Gorman v. Bartch,* 152 F.3d 907, 913 (8th Cir. 1998) (Title II applies to transportation of arrestees). The Ninth Circuit's holding also is consistent with this Court's holding that activities within state prisons fall within the ADA. *See Pa. Dep't of Corr. v. Yeskey,* 524 U.S. 206, 210-11 (1998).

The Fifth Circuit case cited by Petitioners, *Hainze v. Richards,* 207 F.3d 795 (5th Cir. 2000), does not establish an inter-circuit conflict. As an initial matter, the Fifth Circuit decided *Hainze* before almost all of the opinions cited above. Even

then, the court acknowledged that if the police were responding to an emergency call to transport a suicidal person to a hospital for mental health treatment, "[o]nce the area was secure and there was no threat to human safety," the ADA would require the police "to reasonably accommodate [the mentally ill person's] disability in handling and transporting him." *Id.* at 802 (citing *Yeskey*, 524 U.S. 206). In other words, the court did not hold that Title II of the ADA does not apply to law enforcement activities, including arrests; instead, it held that Title II *does apply* if the area is secure and there is no threat to human safety.

Applying that legal standard here, the Fifth Circuit would likely reach *the same result* as the Ninth Circuit did in this case. Although the facts in this case are disputed, a jury could find that after Ms. Sheehan told the police to leave her alone and barricaded herself in her room, the area was secure and there was no threat to human safety. Under that circumstance, the result is the same in the Fifth Circuit as it is in other circuits: consistent with *Folkerts*, *Roberts*, *Seremeth*, *Bircoll*, *Thompson*, *Gohier*, *Gorman*, and the unanimous opinion in this case, the ADA would apply. As a result, there is no conflict between or among the circuits that would warrant this Court's review.

B. The Ninth Circuit Correctly Found That Fact Issues Preclude Summary Judgment Regarding Ms. Sheehan's Claim That Petitioners Violated The ADA When Police Officers Drew Their Guns And Forced Their Way Back Into Ms. Sheehan's Room Without Taking Her Mental Illness Into Account And Without Employing Tactics That Would Have Been Likely To Resolve The Situation Without Injuring Her Or Others.

Moving from "whether" Title II of the ADA applies to law enforcement activities to "how" the ADA applies (Pet. 18), case law confirms that the precise manner in which the ADA applies is intensely factual. Preliminarily, Title II imposes a reasonable accommodation requirement. *See* 28 C.F.R. § 35.130(b)(7); *Tennessee v. Lane*, 541 U.S. 509, 531-32 (2004); *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 591-92 (1999). Consistent with the nature of that requirement, courts have examined the *factual* circumstances of an arrest to determine whether the accommodations provided by law enforcement officers, or demanded by disabled plaintiffs, were reasonable. As discussed briefly below, each case turns on its unique facts.

In *Bahl v. County of Ramsey*, 695 F.3d 778, 784-85 (8th Cir. 2012), for example, the Eighth Circuit held that under the circumstances of the traffic stop, which occurred because the driver ran a red light during rush hour, it was not

unreasonable for the police officer to use gestures to communicate with the driver, who was deaf, instead of returning to the squad car for a pen and paper after the driver resisted the officer's efforts to identify him. Presented with similar circumstances, *i.e.*, a traffic stop and a deaf driver, the Eleventh Circuit concluded that waiting for an interpreter to arrive before administering field sobriety tests was not a reasonable modification of police procedures given the exigent circumstances of a DUI stop on the side of a highway and the serious public safety concerns raised by DUI activity. *Bircoll*, 480 F.3d at 1085-86.

Similarly, in *Tucker v. Tennessee*, 539 F.3d 526, 536 (6th Cir. 2008), after discussing the Eleventh Circuit's decision in *Bircoll*, the Sixth Circuit held that "it would be unreasonable to require" that a sign language interpreter be provided during the domestic disturbance call that resulted in plaintiffs' arrest. The court refused to impose "a stringent requirement" of providing an interpreter when there was no time to do so, and when plaintiffs, who were deaf, conceded that the officers effectively communicated with them using a pen and paper. *Id.* It did not, as Petitioners argue, adopt a "categorical prohibition" on requiring reasonable accommodations when officers are presented with "violent circumstances." Pet. 18. Rather, it ruled that plaintiffs' "generalized claims that they were arrested because of a miscommunication" went "to the merits of the arrest and not the reasonableness of the accommodations made by the officers." *Tucker*, 539 F.3d at 536 (footnote omitted).

In another case involving violent circumstances, the Fourth Circuit performed a detailed examination of law enforcement's response to a hostage situation and concluded that any duty of reasonable accommodation was satisfied. *See Waller ex rel. Estate of Hunt v. City of Danville, Va.*, 556 F.3d 171, 172 (4th Cir. 2009). The police there spent two hours attempting to negotiate with a mentally ill man who was holding his girlfriend hostage in their apartment. Attempts were made by the responding officers, their supervisor, and a qualified hostage negotiator to allow the police to confirm the woman's safety, but the man repeatedly refused to let his girlfriend out or allow anyone else in. The police ran the man's criminal history and learned he had prior arrests for public drunkenness, disorderly conduct, and assault on the girlfriend. They also learned that the man had a history of mental illness. Negotiations ended when the man threatened to blow off the head of the negotiator. The emergency response team forced their way into the apartment and shot the man when he came toward the officers swinging and brandishing what appeared to be weapons.

Describing the efforts the police had made to resolve the standoff peacefully, the Fourth Circuit held that any duty of reasonable accommodation "was satisfied in several ways." *Id.* at 176. The court refused to adopt an "exigent circumstances" exception to the ADA, explaining that exigency is merely "one circumstance that bears materially on the inquiry into reasonableness under the ADA." *Id.* at 175; *accord Seremeth,* 673 F.3d at 339 (finding that "while there is no separate exigent-

circumstances inquiry, the consideration of exigent circumstances is included in the determination of the reasonableness of the accommodation").

This case, too, turns on its facts. As noted previously, Ms. Sheehan submitted in the district court a detailed expert witness report by a former deputy chief of the Los Angeles Police Department (Lou Reiter) disputing the reasonableness of the police officers' actions. Mr. Reiter explained, among other things, that officers are trained not to unreasonably agitate or excite a disabled individual, to contain the individual, to respect the individual's comfort zone, to use nonthreatening communications, and to employ the passage of time to their advantage. Mr. Reiter also concluded that the officers' second entry into Ms. Sheehan's room was tactically unreasonable in light of the foregoing practices and procedures. In his view, the officers should have "elected to relocate to a safer tactical position, call for special units/equipment, and determine the propriety of seeking a warrant." App. 27-28 (ellipsis in original). Mr. Reiter also stated that the officers "knew that other resources were en-route to their call for backup" and concluded that their "continued conduct exacerbated the confrontation, rather than [sic] any effort to [defuse] the agitation." App. 28 (brackets in original).

The panel majority, joined by Judge Graber (App. 48), appropriately described and recounted Mr. Reiter's report in its opinion (App. 26-28). Given that report, the officers' training, and "the totality of the circumstances," and viewing the facts favorably to Ms. Sheehan as required by federal

law, the Ninth Circuit concluded "that a reasonable jury could find that the officers' decision to force a confrontation with Sheehan was objectively unreasonable." App. 28. The Ninth Circuit also noted that, according to the social worker who called for assistance, "the officers knew that there was no way out of the room other than the door they were guarding and that there were no other occupants in the building." App. 29. These facts, the court noted, "distinguish this case from those in which officers' more confrontational tactics were held to be reasonable based on the need to protect others." *Id.* The court therefore remanded the issue for further proceedings. Such an intensely factual interlocutory decision hardly merits this Court's review.

II. The Ninth Circuit's Qualified Immunity Ruling Also Does Not Warrant Review.

Lastly, Petitioners argue that the panel majority's qualified immunity ruling also warrants review. Pet. 28-40. When considering questions of qualified immunity at summary judgment, "courts engage in a two-pronged inquiry." *Tolan v. Cotton*, 134 S. Ct. 1861, 1865 (2014). Under the first prong, the court determines "whether the facts, '[t]aken in the light most favorable to the party asserting the injury, ... show the officer's conduct violated a [federal] right.'" *Id.* (brackets and ellipsis in original) (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). Under the second prong, the court asks whether the right in question was "clearly established" at the time of the violation. *Id.* at 1866.

Here, where excessive force during an arrest is alleged, "the federal right at issue is the Fourth Amendment right against unreasonable seizures." *Id.* at 1865. Determining whether this right has been violated "requires a balancing of "'the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'"" *Id.* at 1866 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)); *accord Graham v. Connor*, 490 U.S. 386, 396 (1989). Under this Court's precedent, the balancing "requires analyzing the totality of the circumstances." *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014).

Even if error review were a proper basis to grant certiorari (which it is not), the panel majority below correctly applied the foregoing legal principles. The panel majority expressly recognized that the Fourth Amendment analysis requires "a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." App. 33. It then performed that balancing as follows:

> Construing the facts favorably to Sheehan, the officers' intrusion on Sheehan's Fourth Amendment rights was profound – the officers forced an entry into her home, apparently without warning and with guns drawn, under conditions that were likely to result in her death. On the other side of the equation, the governmental interest in the intrusion was

> minimal because she was fully contained, not a flight risk and not a danger to the safety of the officers or others; backup was on the way; and trained negotiators could have been used to defuse the crisis.

Id. Lastly, addressing the reasonableness of the officers' actions, the panel majority added: "If there was no pressing need to rush in, and every reason to expect that doing so would result in Sheehan's death or serious injury, then any reasonable officer would have known that this use of force was excessive." *Id.*

Petitioners nevertheless argue that the officers are entitled to qualified immunity because it was not clearly established that they "must delay making an entry into a residence, based on the expected armed resistance of a suspect within – mentally ill or otherwise." Pet. 30. But the panel majority did not hold that Petitioners cannot assert this argument in the district court on remand. Instead, the panel majority explained that it would be "premature" to address this issue at this time because the facts are disputed:

> We emphasize that at trial the facts may show that Sheehan was not contained, that she presented a flight risk, that officers or others were in danger, or that the officers reasonably but mistakenly believed that their entry was necessary to prevent Sheehan's escape or ensure the safety of themselves or others. The facts, however, are disputed, and it would be premature to hold at this stage of the

> proceedings that the officers are – as a matter of law – entitled to qualified immunity

App. 36. As was true regarding Petitioners' reasonable accommodation arguments, such an interlocutory decision hardly merits this Court's review.

But even putting aside the interlocutory nature of the panel majority's analysis, Petitioners' arguments easily fail on both factual and legal grounds. Factually, Petitioners fail to consider the totality of the circumstances and likewise fail to construe the facts in the light most favorable to Ms. Sheehan. Instead, they focus on their characterization of Ms. Sheehan as an "armed ... suspect" without acknowledging that the officers were called to render assistance to a mentally ill person – not to arrest an armed and dangerous "suspect." They likewise ignore the many other facts that the panel majority recounted in its analysis: that Ms. Sheehan was fully contained, that she did not present any danger to the safety of the officers or others, that backup was on the way, that trained negotiators could defuse the crisis, and that there was no pressing need to rush in. App. 33. Petitioners ignore these facts and repeatedly fail to view the record in the light most favorable to Ms. Sheehan as required by this Court's precedent. *See Tolan*, 134 S. Ct. at 1866 ("[U]nder either prong, courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment.").

Legally, the cases cited by Petitioners do not support their argument. In *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294 (1967), for example, the police entered a residence in search of a suspect who had just committed an armed robbery, while in *Scott v. Harris*, 550 U.S. 372 (2007), the police seized a fleeing motorist by ramming his vehicle from behind as he was leading the police on a high-speed chase down public roads. In both cases, the Court held that the unique facts established that there was a need for immediate action by the police. *Warden*, 387 U.S. at 298 ("Under the circumstances of this case, the exigencies of the situation made that course imperative." (internal quotation marks and citation omitted)); *Scott*, 550 U.S. at 384 ("[I]t is clear from the videotape that respondent posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase."). In this case, in contrast, the facts – viewed in the light most favorable to Ms. Sheehan – do not establish any comparable need for immediate action.

Similarly, neither *Stanton v. Sims*, 134 S. Ct. 3 (2013) (per curiam), nor *Ryburn v. Huff*, 132 S. Ct. 987 (2012) (per curiam), provides support for Petitioners' argument. At issue in *Stanton* was whether it was "clearly established" that an officer with probable cause to arrest a suspect for a misdemeanor could enter a home without a warrant while in hot pursuit of that suspect. 134 S. Ct. at 5. In *Ryburn*, the police confronted a juvenile who was suspected of threatening to "shoot up" his

school and was known to have been the victim of bullying and the juvenile's mother who, when asked if there were any guns in the house, "immediately turned around and ran into the house." 132 S. Ct. at 988-89. The Court considered "the string of events that unfolded at the [plaintiffs'] residence" and concluded that reasonable police officers in the defendants' position could read the Court's precedent as acknowledging that the Fourth Amendment permits an officer to enter a residence if the officer has a reasonable basis for concluding that there is an imminent threat of violence. *Id.* at 991. There was no fleeing suspect in this case, as there was in *Stanton*, and there was no bench trial with factual findings that reasonable officers could have believed there were guns in the house and that family members or the police were in danger, as there was in *Ryburn*. Neither opinion is controlling here.

Just as the *Warden*, *Scott*, *Stanton*, and *Ryburn* cases all involved circumstances that were factually far different from this case, so does the state law authority cited by Petitioners. Pet. 35. In *Hernandez v. City of Pomona*, 207 P.3d 506 (Cal. 2009), the police officers pursued a suspect who led them on a high-speed chase and then fled on foot after he crashed his car. Under these circumstances, the court held that California law authorized the police "to pursue Hernandez and to use reasonable force to make an arrest." *Id.* at 519. As argued above, this case is far different. Plaintiffs also cite California Penal Code § 835a, which provides that a law enforcement officer with

reasonable cause to make an arrest "may use reasonable force to effect the arrest" and "need not retreat or desist from his efforts [to make an arrest] by reason of the resistance or threatened resistance of the person being arrested." Neither *Hernandez* nor the statute relieves the police officers in this case from their constitutional obligation to carry out searches and seizures in a reasonable manner. *See Garner*, 471 U.S. at 22 (holding state statute governing use of force during arrest unconstitutional insofar as it authorized use of deadly force against unarmed, nondangerous suspects).

Rather than hide behind state authorities that do not apply here, the police officers were required to comply with federal law. The panel majority cited several cases that are plainly instructive here. In *Alexander v. City & County of San Francisco*, 29 F.3d 1355, 1366 (9th Cir. 1994), the court held that it was unreasonable for police officers "to storm the house of a man whom they knew to be a mentally ill, elderly, half-blind recluse who had threatened to shoot anybody who entered." In accordance with this Court's opinion in *Graham*, 490 U.S. at 390, the court described such conduct as "a classic Fourth Amendment violation under *Graham*." *Id.* Likewise, in *Deorle v. Rutherford*, 272 F.3d 1272, 1283 (9th Cir. 2001), the court emphasized "that where it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining, under *Graham*, the reasonableness of the force employed."

Summarizing this body of law, the panel majority concluded:

> Although the facts of *Alexander* are not identical to those of this case, *Graham*, *Alexander* and *Deorle* would have placed any reasonable, competent officer on notice that it is unreasonable to forcibly enter the home of an armed, mentally ill subject who had been acting irrationally and had threatened anyone who entered when there was no objective need for immediate entry.

App. 35-36. Sergeant Reynolds and Officer Holder ignored this body of law. Given the disputed facts at issue, the panel majority correctly held that the police officers are not entitled to qualified immunity as a matter of law. App. 36. This ruling, like the Ninth Circuit's ADA rulings, does not warrant this Court's review.

III. This Case Is A Poor Vehicle For Reviewing The Claimed ADA And Qualified Immunity Issues.

Even if Petitioners could establish that an inter-circuit conflict exists regarding the claimed ADA and qualified immunity issues that would otherwise warrant this Court's review (which they cannot), the petition for a writ of certiorari should be denied because this case is a poor vehicle for reviewing the claimed ADA and qualified immunity issues. That is so for at least the following reasons:

1. The case does not squarely present the first Question Presented. That question asks the Court

to decide "[w]hether Title II of the Americans with Disabilities Act requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect *in the course of bringing the suspect into custody.*" Pet. i (emphasis added). But police were not summoned to Ms. Sheehan's home to bring a "suspect into custody." The police were called, instead, on a nonemergency basis, to assist in the transportation of Ms. Sheehan to a hospital for mental evaluation and treatment. Ms. Sheehan was not holding a hostage, was not threatening to leave her room so that she could injure some third party, and was not threatening to harm herself. Nor did the social worker check the box on the Section 5150 application to indicate that Ms. Sheehan was a danger to herself. Instead, the law enforcement officers were called to assist a disabled individual in need of treatment, not arrest an armed and violent suspect. For this reason alone, the case is a poor vehicle to address Petitioners' proposed ADA issue.

2. In addition, rather than presenting a clear legal issue for the Court's consideration, Petitioners are merely rearguing their version of the facts. Petitioners admit, as they must, that "for purposes of evaluating the defendants' motion for summary judgment we view the evidence in the light most favorable to Sheehan, the nonmoving party." Pet. 9 n.1. Yet they repeatedly present the facts in the light most favorable to their own arguments, asserting (for example) that it was "necessary" to reenter Ms. Sheehan's room "to ensure officer safety and prevent escape and potential harm to others" and that upon such reentry Ms. Sheehan

"charged at the officers with a knife." Pet. 11. These facts are not only contrary to the district court record (as discussed above) but are material to the formulation and resolution of the Questions Presented in their petition. Such factual disputes do not remotely warrant this Court's review.

3. The panel majority's decision is manifestly correct. Viewed in the light most favorable to Ms. Sheehan, the record shows that (a) Ms. Sheehan did not present a danger to others (the residence, after all, had been vacated), (b) Ms. Sheehan was barricaded in her room and there was no risk that she would flee (other than the door to the hall, the only way out of Ms. Sheehan's second-floor room was through a window, which would require a ladder), (c) the less-than-lethal force unit was en route and would arrive shortly (indeed, those officers had arrived and one of the officers was about to pull his nonlethal weapon from the trunk of his car when shots were fired), (d) even after the police officers forced their way back into Ms. Sheehan's room, she did not violently attack them, and (e) in all events, it was neither reasonable nor necessary to shoot Ms. Sheehan five times, at point-blank range, having just incapacitated her with pepper spray. On this record, the panel majority correctly concluded that "[a] reasonable jury ... could find that the situation had been defused sufficiently, following the initial retreat from Sheehan's room, to afford the officers an opportunity to wait for backup and to employ less confrontational tactics, including the accommodations that Sheehan asserts were

necessary." App. 45. There is no compelling reason to disturb that analysis.

4. The panel majority did not issue a decision that is conducive to further review, nor did it intend to do so. Rather than squarely decide the ADA and qualified immunity issues, the panel majority concluded that fact issues preclude summary judgment as to both issues and therefore remanded those issues for further proceedings. App. 48. As discussed above, the panel majority's ruling does not present a conflict among the circuits, nor does it present any discrete legal issues. Instead, the claimed ADA and qualified immunity issues are intensely factual. In accordance with the panel majority's opinion, those fact issues will be resolved on remand. At that point, there will presumably be another appeal from the district court's final judgment. Even if the Ninth Circuit's opinion presents issues that may warrant this Court's review (which it does not), the Court should await the Ninth Circuit's decision on appeal from a final judgment, after further fact-finding and legal analysis, before granting certiorari.

5. Granting review would delay needed training and reforms regarding the manner in which police officers interact with disabled citizens. Confirming that police officers have long known that the ADA's reasonable accommodation requirement applies to law enforcement activities, including arrests, the United States Department of Justice ("DOJ") in 2006 offered 25,000 police departments, sheriff's offices, highway patrols, and other state and local law enforcement agencies a

variety of free ADA publications and videotapes addressing law enforcement activities involving people who have mental and other disabilities.[2] In response, a leading law enforcement publication confirmed that "Title II of the ADA applies to law enforcement agencies" and urged readers: "If you have been the recipient of this recent DOJ mailing, take advantage of the resources it provides."[3] Granting review in this matter may interfere with these important efforts to educate law enforcement officers regarding the rights of disabled individuals and thereby decrease the use of force in situations involving such individuals. For that reason too, the petition should be denied.

IV. There Is No Reason To Hold The Petition For *Plumhoff v. Rickard* Because The Court's Opinion In *Plumhoff* Is Not Controlling Here.

Lastly, Petitioners assert that "[t]he Court should hold this petition for *Plumhoff v. Rickard*." Pet. 41. There is no need to do so because the Court has since decided *Plumhoff*. The Court there held that the defendant police officers did not

---

[2] Disability Rights Online News, Department Undertakes Major Initiative to Educate State and Local Law Enforcement Agencies About the ADA (June 2006), *available at* http://www.ada.gov/newsltr0606.htm.

[3] The Police Chief – the Professional Voice of Law Enforcement, Title II of the Americans with Disabilities Act: The Potential for Police Liability and Ways to Avoid It (Sept. 2006), *available at* http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=1004&issue_id=92006.

violate the Fourth Amendment when they shot a driver to end a dangerous car chase (134 S. Ct. at 2017) and that the officers were in any event entitled to qualified immunity because "no clearly established law precluded [the officers'] conduct at the time in question" (*id.* at 2023). In deciding the qualified immunity issue, the Court followed its earlier opinion in *Brosseau v. Haugen*, 543 U.S. 194 (2004) (per curiam), which held that a police officer did not violate clearly established law when she fired at a fleeing vehicle to prevent harm to officers, occupants of other vehicles, and citizens in the area. *Plumhoff*, 134 S. Ct. at 2023. This case does not involve a fleeing vehicle, and, as discussed at length above, the facts (viewed in the light most favorable to Ms. Sheehan) do not establish any similar risk of harm to others. As such, *Plumhoff* is inapposite.[4]

---

[4] On January 26, 2014, two amici briefs were filed on behalf of various state associations of counties, cities, municipal attorneys, and law enforcement officers (Amici States Br.) and international and national associations of municipal attorneys and sheriffs (Amici Int'l Br.). The Amici States' arguments largely echo Petitioners' and fail for the same reasons. They claim, for example, that Officer Holder and Sergeant Reynolds would have put themselves and the public at risk had they not immediately reentered Ms. Sheehan's room without awaiting assistance or attempting first to deescalate the situation. Amici States Br. 2, 15-18. As discussed in the text above, that assertion is intensely factual and – as the panel majority correctly found (App. 36) – the corresponding fact disputes cannot properly be resolved at this stage of the proceeding. *See Tolan*, 134 S. Ct. at 1866-68. The Amici Int'l brief, in turn, asserts that the ADA should not be applied to law enforcement activities (Amici Int'l Br. 5-10, 15-22) – a

(continued .)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

LEONARD J. FELDMAN
Counsel of Record
PETERSON WAMPOLD ROSATO
LUNA KNOPP
1501 4TH AVENUE, SUITE 2800
SEATTLE, WA 98101
(206) 624-6800
feldman@pwrlk.com

Counsel for Respondent

(. continued)
position that is contrary to controlling precedent, DOJ's guidance materials, and a leading law enforcement publication as discussed in the text above. The DOJ materials also allay any concerns regarding "the availability of local resources" and "careful consideration at the agency level." Amici Int'l Br. 16. Finally, the Amici Int'l brief also emphasizes that law enforcement officers should be afforded "maximum discretion in arrest settings." Amici Int'l Br. 10. But this lawsuit did not involve an "arrest setting," and any arguments regarding "maximum discretion" of police officers are best made after further fact-finding and legal analysis as the panel majority decreed.

REPLY BRIEF

Supreme Court, U.S.
FILED
OCT 23 2014
OFFICE OF THE CLERK

No. 13-1412

In The Supreme Court of the United States

CITY AND COUNTY OF SAN FRANCISCO, KIMBERLY REYNOLDS, and KATHRINE HOLDER,

Petitioners,

v.

TERESA SHEEHAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

SAN FRANCISCO CITY ATTORNEY'S OFFICE
DENNIS J. HERRERA
City Attorney
BLAKE P. LOEBS
PETER J. KEITH, *Counsel of Record*
CHRISTINE VAN AKEN
Deputy City Attorneys
1390 Market Street, 7th Floor
San Francisco, California 94102-5408
Telephone: (415) 554-3908
Facsimile: (415) 554-3837
E-Mail: peter.keith@sfgov.org

Counsel for Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

Page

I. Certiorari should be granted to resolve whether and how the Americans With Disabilities Act applies to arrests of armed and violent suspects who are disabled..... 1

II. Certiorari should be granted to review the Ninth Circuit's qualified immunity and Fourth Amendment rulings..... 4

TABLE OF AUTHORITIES

Page

CASES:

Bragdon v. Abbott, 524 U.S. 624 (1998) 3

De Boise v. Taser Int'l, Inc., 760 F.3d 892 (8th Cir. 2014) 2

Graham v. Connor, 490 U.S. 386 (1989) 8

Hainze v. Richards, 207 F.3d 795 (5th Cir. 2000) 1, 2

Plumhoff v. Rickard, 134 S. Ct. 2012 (2014) 4, 6-8

Scott v. Harris, 550 U.S. 372 (2007) 6, 7

Tolan v. Cotton, 134 S. Ct. 1861 (2014) 5

Tucker v. Tennessee, 539 F.3d 526 (6th Cir. 2008) 2

Wilson v. Layne, 526 U.S. 603 (1999) 6

CONSTITUTION, STATUTES, AND REGULATIONS:

U.S. Const. Amend. IV 4-8

Americans With Disabilities Act of 1991, 42 U.S.C. §§ 12101 *et seq.*:
Tit. II, 42 U.S.C. §§ 12131 *et seq.* 1-3

I. Certiorari should be granted to resolve whether and how the Americans With Disabilities Act applies to arrests of armed and violent suspects who are disabled

There is a genuine conflict among the circuits whether Title II of the Americans with Disabilities Act requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect while bringing the suspect into custody. Indeed, in the months since the petition was filed, that conflict has only deepened. This case is an appropriate vehicle for this Court to resolve the circuit conflict concerning an important question of federal law.

1. As the petition demonstrated, the Fifth and Sixth Circuits do not require police officers to provide reasonable accommodations to disabled suspects when exigent circumstances or public safety concerns are present. By contrast, the Fourth, Ninth, and Eleventh Circuits consider exigency as one aspect of the inquiry into whether proposed accommodations are reasonable. Pet. 18-21. Respondent insists that there is no conflict among the circuits on the question whether "Title II [of the ADA] applies to law enforcement activities, including arrests." BIO 10. But that is not the question presented by this case. On the issue whether Title II requires officers to provide accommodations for *violent* and *dangerous* mentally ill individuals, there can be no doubt a conflict exists; the Ninth Circuit acknowledged its disagreement with the Fifth Circuit's decision in *Hainze v. Richards*, 207 F.3d 795 (5th Cir. 2000). Pet. App. 42.

2. Indeed, since the petition was filed, this conflict has deepened – a development that respondent ignores. The Eighth Circuit recently joined the Fifth and Sixth Circuits in construing Title II to bar accommodation claims by violent and dangerous individuals. In *De Boise v. Taser Int'l, Inc.*, 760 F.3d 892 (8th Cir. July 28, 2014), that court rejected a reasonable accommodation claim against police officers who – like petitioners here – were responding to a schizophrenic individual's "aggressive and irrational behavior and his continued noncompliance with their demands." *Id.* at 899. Like respondent here, the plaintiffs in *De Boise* urged that the officers violated the ADA reasonable accommodation requirement when they did not follow their departmental training for dealing with mentally disturbed persons. *Id.* at 898-99. The Eighth Circuit rejected the claim, holding that Title II does not require police officers to accommodate disabilities in the midst of a violent encounter: "Due to the unexpected and rapidly evolving circumstances, the officers were not required 'to hesitate to consider other possible actions in the course of making such split-second decisions.'" *Id.* at 899 (quoting *Hainze*, 207 F.3d at 801-02). In so holding, the Eighth Circuit relied on both the Fifth Circuit's decision in *Hainze* and the Sixth Circuit's decision in *Tucker v. Tennessee*, 539 F.3d 526 (6th Cir. 2008). *De Boise*, 760 F.3d at 899 (quoting *Tucker*, 539 F.3d at 536: "[W]e rely on and expect law enforcement officers to respond fluidly to changing situations and individuals they encounter. Imposing a stringent requirement under the ADA is inconsistent with that

expectation, and impedes their ability to perform their duties.").[1]

3. This is a proper case for resolving the ADA question. Resolution of the question presented does not require a fact-intensive "reasonable accommodation" inquiry. *But see* BIO 12-16. Rather, it is undisputed here that the respondent was armed and violent. Thus, the only question for this Court to resolve is whether any accommodation of an armed and violent individual is reasonable or required under Title II of the ADA.

4. This question remains vitally important for local governments, law enforcement agencies, and disabled persons alike – as amici have urged – and respondent does not argue otherwise. This Court should grant the petition to address this important question.

---

[1] The Fifth, Sixth, and Eighth Circuits construe Title II consistently with the United States Department of Justice, which has explained that anyone who poses a direct threat to safety is not "qualified" to participate in public services, programs or activities. Pet. 25-27. Respondent is silent about the conflict between the Ninth Circuit's ruling and the USDOJ's administrative construction of Title II, which is entitled to deference, *Bragdon v. Abbott*, 524 U.S. 624, 646 (1998).

II. Certiorari should be granted to review the Ninth Circuit's qualified immunity and Fourth Amendment rulings

The majority also announced a new Fourth Amendment search rule: Even when an established exception to the warrant requirement applies, the Fourth Amendment nonetheless requires that officers delay entering the residence of an armed, violent, and mentally ill suspect if that suspect can be expected to resist arrest, unless countervailing circumstances create an "immediate need" to enter. Pet. App. 28-29. The majority further held this rule to be clearly established in 2008. This Court should grant certiorari on the second question presented, either to review these rulings or to vacate and remand the case for the Ninth Circuit's further consideration in light of *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014).

1. Respondent is wrong to suggest that the second question presented seeks mere error correction. BIO 17. To the contrary, the Ninth Circuit's Fourth Amendment decision creates both a circuit conflict and a conflict with several States' statutes. The Ninth Circuit's new Fourth Amendment rule is at odds with the rule that the First, Fifth, and Eleventh Circuits have applied in similar situations involving police entries into the homes of violent individuals who are mentally disturbed. Unlike the Ninth Circuit, those circuits ask simply whether an exception to the warrant requirement applies. Those circuits do not second-guess officers' tactical decisions regarding the timing of the entry, and they do not construe the

Fourth Amendment to require officers to delay entering due to the prospect of violent resistance. Pet. 36-37. Similarly, several States have enacted statutes that expressly authorize law enforcement officers to press forward to make an arrest in the face of resistance. Pet. 35-36, 40. The ruling here would preempt the application of those States' statutes.

2. Contrary to respondent, there are no disputed fact questions that would preclude this Court from resolving the second question presented. Respondent urges that here there is a dispute whether petitioners were called to "render assistance" to respondent, or respondent was an "armed and dangerous 'suspect.'" BIO 19. But here, *both* of those facts are true: when petitioners lawfully entered respondent's home to involuntarily hospitalize her, she assaulted them with a knife while threatening to kill them. Pet. App. 11. Thus, the legal issues squarely presented are whether a mentally ill person may terminate a lawful search by violently assaulting police officers – and whether that legal rule was clearly established for petitioners in 2008.

For similar reasons, respondent is wrong to argue for delay based on *Tolan v. Cotton*, 134 S. Ct. 1861 (2014). BIO 19, 28. In *Tolan*, there were factual disputes at summary judgment about what really happened. Unlike *Tolan*, however, this case involves no undisputed facts about what really happened. Granted, the undisputed facts here give rise to competing arguments about reasonableness and about the state of clearly established law in 2008. But those

are legal questions, not factual disputes. As this Court explained in *Scott v. Harris*, 550 U.S. 372 (2007), it is a "pure question of law" whether conduct under the Fourth Amendment was reasonable, "once we have determined the relevant set of facts and drawn all inferences in favor of the nonmoving party to the extent supportable by the record." *Id.* at 381 n.8. Likewise, it is a legal question whether qualified immunity applies on a given summary judgment record. *Plumhoff*, 134 S. Ct. at 2019.

3. Respondent's defense of the majority's Fourth Amendment rule, BIO 16-22, gives little attention to the question actually presented: whether that rule was clearly established in 2008. Moreover, respondent ignores that four Article III judges have already weighed in on this Fourth Amendment question, with two judges coming down on the side of the officers and two against. Under those circumstances, there can be no question that qualified immunity applies. *Wilson v. Layne*, 526 U.S. 603, 618 (1999) ("If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.").

4. For all of these reasons, it would be proper to grant the petition for full briefing and argument on the second (Fourth Amendment) question presented as well as the first (ADA) question. Indeed, as amici have urged, granting the petition as to both questions presented would permit this Court to provide crucial guidance about what obligations federal law imposes on law enforcement officers when they come into

contact with mentally ill persons who are armed and violent.

5. Even if the Court decides not to grant the petition for purposes of full briefing or a summary reversal, *see* Pet. 38, the Court should grant the petition in order to remand the case for further consideration in light of *Plumhoff v. Rickard*. That recent decision explained important principles governing Fourth Amendment and qualified immunity analysis – principles that, if applied properly, would likely lead to a different decision below.

a. This Court confirmed in *Plumhoff* that on a given summary judgment record, disputes about Fourth Amendment reasonableness and qualified immunity are legal disputes for courts to decide. *Plumhoff*, 134 S. Ct. at 2019. Here, however, the majority did not follow this principle. Instead, faced with some undisputed facts from which it could be argued that petitioners acted reasonably, and other undisputed facts from which it could be argued that petitioners acted unreasonably, the court of appeals concluded that this constituted a factual dispute for the jury – not a legal question for the court. Pet. App. 26-32. But when advocates advance competing arguments about reasonableness by arguing the relative importance of different undisputed facts, that does not mean the facts are disputed. Rather, that simply reflects the reality that to resolve a Fourth Amendment legal question, a court "must still slosh our way through the factbound morass of 'reasonableness.'" *Scott*, 550 U.S. at 383.

b. Also in *Plumhoff*, this Court outlined the essential principles that must guide qualified immunity analysis. Among other things, this Court explained in *Plumhoff* that because the reasonableness standard in *Graham v. Connor*, 490 U.S. 386 (1989), is "cast at a high level of generality," *Graham* did not clearly establish what Fourth Amendment rule controls in a given specific situation. *Plumhoff*, 134 S. Ct. at 2023. Contrary to this principle, the majority relied on *Graham* to clearly establish the law for petitioners. Pet. App. 35. This Court also explained in *Plumhoff* that for the law to be clearly established there must be "a controlling case or a robust consensus of cases that could be said to have clearly established the unconstitutionality" of officers' conduct. *Plumhoff*, 134 S. Ct. at 2024. But the majority here identified neither a controlling case nor a robust consensus of existing cases supporting its rule. Indeed, the majority ignored a robust consensus of out-of-circuit cases that reached the *opposite* conclusion: nothing more than an established exception to the warrant requirement is necessary for officers to lawfully enter the home of an armed and violent mentally ill individual. Pet. 32-37.

Thus, it would also be proper to grant the petition and remand this case for further consideration in light of *Plumhoff*.

For the reasons in the original petition as well as the reasons stated above, the Court should grant the petition.

Respectfully submitted,

SAN FRANCISCO CITY ATTORNEY'S OFFICE
DENNIS J. HERRERA
City Attorney
BLAKE P. LOEBS
PETER J. KEITH, *Counsel of Record*
CHRISTINE VAN AKEN
Deputy City Attorneys

Counsel for Petitioners

October 23, 2014

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
JUN 26 2014
OFFICE OF THE CLERK

No. 13-1412

In The
Supreme Court of the United States

CITY AND COUNTY OF
SAN FRANCISCO, CALIFORNIA, ET AL.,

Petitioners,

v.

TERESA SHEEHAN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* CALIFORNIA STATE ASSOCIATION OF COUNTIES, LEAGUE OF CALIFORNIA CITIES, WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS, WASHINGTON ASSOCIATION OF SHERIFFS AND POLICE CHIEFS, AND THE ASSOCIATION OF WASHINGTON CITIES IN SUPPORT OF PETITIONERS

COUNTY OF SANTA CLARA OFFICE OF THE COUNTY COUNSEL
ORRY KORB, County Counsel
DANNY CHOU, Assistant County Counsel
Counsel of Record
GRETA S. HANSEN, Lead Deputy County Counsel
MELISSA R. KINIYALOCTS, Deputy County Counsel
70 West Hedding Street, East Wing, 9th Floor
San Jose, California 95110
Telephone: (408) 299-5900
danny.chou@cco.sccgov.org

VANCOUVER CITY ATTORNEY'S OFFICE
DANIEL G. LLOYD, Assistant City Attorney
P.O. Box 1995, Vancouver, Washington 98668
Telephone: (360) 487-8500
dan.lloyd@cityofvancouver.us

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

		Page
I.	INTEREST OF THE *AMICI CURIAE*	1
II.	SUMMARY OF REASONS FOR GRANTING THE PETITION	2
III.	BACKGROUND	5
	A. Local Law Enforcement Encounters With Mentally Ill Persons Are Increasing	6
	1. The number of persons with serious mental illnesses has been steadily increasing, and most do not receive treatment	6
	2. Since the 1960s, deinstitutionalization has increased the number of mentally ill persons living in the community	7
	3. Resources for the treatment of mentally ill persons have been significantly reduced in recent years	8
	B. Police Have Become The De Facto First Responders For Mental Illness	9
	C. Although Law Enforcement Agencies Are Developing Specialized Programs For Dealing With The Mentally Ill, Those Efforts Are Constrained By Limited Resources And Differing Needs	12
	D. The Impact Of These Specialized Programs On The Rate And Severity Of Injuries During Police Encounters With The Mentally Ill Is Unclear	14

TABLE OF CONTENTS – Continued

Page

IV. REASONS FOR GRANTING THE PETITION 15

A. Holding Law Enforcement Agencies And Officers Liable Where The Use Of Force Was Reasonable Puts Officers And The Public At Risk 16

B. Holding Police Officers And Their Agencies Liable For The Use of Reasonable Force Will Stifle Innovative Approaches To Dealing With The Mentally Ill And Deprive Local Governments Of Much-Needed Resources 19

C. The Ninth Circuit's Decision Unfairly Shifts Responsibility For Treating Mentally Ill Persons To Local Law Enforcement 22

D. Existing Fourth Amendment Limits On The Use Of Force Are Sufficient To Ensure That Mental Disabilities Are Reasonably Accommodated In Exigent Circumstances And To Protect Suspects From Unreasonable Search And Seizure 24

V. CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Bragdon v. Abbott, 524 U.S. 624 (1998).....26

Connecticut Dept. of Maintenance v. Heckler, 471 U.S. 524 (1985).....7

Fisher v. City of San Jose, 558 F.3d 1069 (9th Cir. 2009).....25

Graham v. Connor, 490 U.S. 386 (1989).....16, 24, 25

Hainze v. Richards, 207 F.3d 798 (5th Cir.), *cert. denied*, 531 U.S. 959 (2000).....23

Plumhoff v. Rickard, 134 S.Ct. 2012 (2014).....25

Ryburn v. Huff, 132 S.Ct. 987 (2012).....18

Scott v. Henrich, 39 F.3d 912 (9th Cir. 1994).....26

Sheehan v. City and County of San Francisco, 743 F.3d 1211 (9th Cir. 2014).....19, 20

State v. Allery, 682 P.2d 312 (Wash. 1984).....25

Tucker v. Tennessee, 539 F.3d 526 (6th Cir. 2006), *cert. denied*, 558 U.S. 816 (2009).....23

CONSTITUTION, STATUTES, AND REGULATIONS

U.S. Const. Amend. IV .....*passim*

42 U.S.C. §1983 .....3, 15

Americans With Disabilities Act of 1991, 42 U.S.C. §§12101 et seq. .....*passim*

TABLE OF AUTHORITIES – Continued

Page

Community Mental Health Centers and Construction Act, Pub. L. 88-164, 77 Stat. 282 (1964) 7

ALA. CODE §22-52-91 (1975) 9

ALASKA STAT. §47.30.705 (1984) 9

ARIZ. REV. STAT. §36-529 (1989) 9

ARK. CODE ANN. §20-47-210 (1989) 9

CAL. PENAL CODE §835a (2014) 25

CAL. WELF. & INST. CODE §5150 (2014) 9

COLO. REV. STAT. §27-65-105 (2011) 9

CONN. GEN. STAT. §17a-503 (2010) 9

DEL. CODE ANN. tit. §5122 (1953) 10

FLA. STAT. §394.463 (2006) 10

GA. CODE ANN. §37-3-41 (1994) 10

HAW. REV. STAT. §334-59 (2013) 10

IDAHO CODE §66-326 (2013) 10

405 ILL. COMP. STAT. 5/3-606 (2010) 10

IND. CODE ANN. §12-26-4-1 (2013) 10

IOWA CODE ANN. §229.22 (2013) 10

KAN. STAT. ANN. §59-2953 (1998) 10

KY. REV. STAT. ANN. §202A.041 (1982) 10

LA. REV. STAT. ANN. §28:53 (2012) 10

ME. REV. STAT. tit. 34, §3862 (2010) 10

TABLE OF AUTHORITIES – Continued

Page

MD. CODE ANN., HEALTH-GEN. §10-624 (2010) 10
MASS. GEN. LAWS ANN. ch. 123 §12 (2010) 10
MICH. COMP. LAWS. ANN. §330.1427 (1995) 10
MINN. STAT. ANN. §253B.05 (2010) 10
MISS. CODE ANN. §41-21-67 (2014) 10
MO. ANN. STAT. §632.300 (1996) 10
MONT. CODE ANN. §53-21-129 (2013).....10
NEB. REV. STAT. ANN. §71-919 (2007) 10
NEV. REV. STAT. ANN. §433A.160 (2007).....10
N.H. REV. STAT. ANN. §135-C:29 (2014).....10
N.J. STAT. ANN. §30:4-27.6 (2009).....10
N.M. STAT. ANN. §43-1-10 (2013).....10
N.Y. MENTAL HYG. LAW §9.41 (1989) 10
N.C. GEN. STAT. ANN. §122C-262 (1997) 10
N.D. CENT. CODE ANN. §25-03.1-25 (2013).....10
OHIO REV. CODE ANN. §5122.10 (2013).....10
OKLA. STAT. ANN. tit. 43A, §5-207 (2012) 10
OR. REV. STAT. ANN. §426.228 (2013) 10
50 PA. CONS. STAT. ANN. §4405 (1966).....10
R.I. GEN. LAWS §40.1-5-7 (1987).....10
S.C. CODE ANN. §44-178-440 (1994) 10
S.D. CODIFIED LAWS §27A-10-3 (1991).....10
TENN. CODE ANN. §33-6-402 (2000) 10

TABLE OF AUTHORITIES – Continued

Page

TEX. HEALTH & SAFETY CODE ANN. §573.001 (2013) 10

UTAH CODE ANN. §62A-15-629 (1953) 10

VT. STAT. ANN. tit. 18, §7505 (1977) 10

VA. CODE ANN. §37.1-67.01 (2013) 10

WASH. REV. CODE §71.05.150 (2011) 10

W. VA. CODE ANN. §9-6-5 (1984) 10

WIS. STAT. ANN. §51.20 (1987) 10

WYO. STAT. ANN. §25-10-109 (2013) 10

28 C.F.R.

§35.104 26
§35.139(a) 26

MISCELLANEOUS

J. Peter Blair, *Reasonableness and Reaction Time*, 14 Police Q. 323 (2011) 17, 18, 21, 22

Tim A. Bruckner, Jangho Yoon, Timothy T. Brown & Neal Adams, *Involuntary Civil Commitments After the Implementation of California's Mental Health Services Act*, 61 Psychiatric Services 1006 (2010) 10

Michael T. Compton, et al., *A Comprehensive Review of Extant Research on Crisis Intervention Team (CIT) Programs*, 36 J. Am. Acad. Psychiatry & L. 47 (2008) 12, 15

TABLE OF AUTHORITIES – Continued

Page

Gary Cordner, *People with Mental Illness*, Problem Oriented Guides for Police, Problem-Specific Guides Series No. 40, May 2006 .....*passim*

Amy Kerr, et al., *Police Encounters, Mental Illness and Injury: An Exploratory Investigation*, 10 J. Police Crisis Negot. 116 (2010) .....*passim*

Ronald C. Kessler, et al., *US Prevalence and Treatment of Mental Disorders: 1990-2003*, 352 New Engl. J. Med. 2515 (2005) 7

National Alliance on Mental Illness, *Mental Illness Facts and Numbers* (2013) 6, 7

National Alliance on Mental Illness, *State Mental Health Cuts: The Continuing Crisis* (2011) 8, 9

Melissa Reuland, et al., *Law Enforcement Responses to People with Mental Illnesses: A Guide to Research-Informed Policy and Practice* (2009) .....*passim*

Melissa Reuland & Matt Schwarzfeld, *Improving Responses to People with Mental Illnesses: Strategies for Effective Law Enforcement Training* (2008) 13, 21

Peter H. Silverstone, et al., *A Novel Approach to Training Police Officers to Interact with Individuals Who May Have a Psychiatric Disorder,* 41 J. Am. Acad. Psychiatry & L. 344 (2013) .....*passim*

TABLE OF AUTHORITIES – Continued

Page

E. Fuller Torrey, et al., *Justifiable Homicides by Law Enforcement Officers: What Is the Role of Mental Illness* (2013) 6, 9, 11, 19, 23

Abigail S. Tucker, et al., *Law Enforcement Response to the Mentally Ill: An Evaluative Review*, 8 Brief Treatment & Crisis Intervention 236 (2008) .....*passim*

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS

I. INTEREST OF THE *AMICI CURIAE*[1]

The California State Association of Counties ("CSAC"), the League of California Cities ("League"), the Washington State Association of Municipal Attorneys ("WSAMA"), the Washington Association of Sheriffs and Police Chiefs ("WASPC"), and the Association of Washington Cities ("AWC") respectfully submit this *amicus curiae* brief in support of the Petition for a Writ of Certiorari filed in this case.

CSAC is a non-profit corporation with a membership comprised of California's 58 counties. The League is an association of 471 California cities. WSAMA is a non-profit organization of municipal attorneys in Washington State who represent the 281 municipalities throughout the state. WASPC is comprised of executive and top management personnel from law enforcement agencies throughout Washington State. AWC is a private, non-profit corporation that serves all its municipal members through advocacy, education, and services.

---

[1] Pursuant to Supreme Court Rule 37.2(a), notice of *amici curiae*'s intent to file this brief was received by counsel of record for all parties at least 10 days before the due date of this brief and all parties consent to the filing of this brief. The undersigned affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici curiae*, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

The cities, counties, and law enforcement agencies represented by these organizations provide a wide array of essential public services to California and Washington residents, including operating and overseeing the local law enforcement agencies charged with ensuring public safety. They also have substantial experience with and interest in law enforcement encounters with mentally ill individuals.

CSAC, the League, WSAMA, WASPC, and AWC monitor litigation of concern to municipalities and law enforcement agencies, and identify those cases that have substantial statewide or nationwide significance. Each organization has identified this case as having such significance, and each respectfully requests that the Court grant the petition for the reasons set forth below.

II. SUMMARY OF REASONS FOR GRANTING THE PETITION

This case presents an important question regarding the scope of liability under the American with Disabilities Act and the Fourth Amendment when police officers exercise force during encounters with armed and dangerous suspects with mental illnesses. The Ninth Circuit Court of Appeals held that law enforcement agencies and officers may be subject to liability under the ADA or the Fourth Amendment based on an expert's after-the-fact opinion second-guessing the manner in which officers made contact with a suspect, even when their use of force is reasonable. In

so holding, the Ninth Circuit dramatically expanded liability for those officers and the local governments that employ them. This unprecedented expansion of liability has serious consequences.

Notably, since the advent of deinstitutionalization in the 1960s, the number of mentally ill persons living in the community rather than in locked facilities has grown significantly. At the same time, the mental health system has been unable to handle the large influx of mentally ill persons into the community. As a result, many persons with mental illness receive little or no treatment, police officers have become de facto first responders to mental health crises, and police encounters with the mentally ill have skyrocketed.

The wide spectrum of mental illnesses and exigent circumstances present police officers with tremendous challenges on a daily basis. Despite this, injuries during police encounters with the mentally ill mirror the injuries that occur during encounters with the general population. And law enforcement agencies are developing specialized programs and training so their officers can better handle these encounters.

The Ninth Circuit's decision threatens to change this positive trend. Because the decision raises the specter of ADA and 42 U.S.C. §1983 liability even when police officers use reasonable force and act under established exceptions to the warrant requirement, it will induce paralysis and inaction. When dealing with an armed and dangerous suspect, hesitancy and delay

often put officers, innocent bystanders, and suspects at risk of injury or death. Imposing liability for moment-to-moment decisions made by officers during encounters with violent, mentally ill persons will also stifle innovation in how best to deal with these encounters, and will deprive local governments of much-needed resources. Currently, there is no evidence-based model for reducing injuries during police encounters with the mentally ill. And law enforcement agencies are attempting to develop best practices through research and study. The Ninth Circuit's decision, by contrast, seeks to establish best practices through litigation and based solely on the testimony of a single expert opining on the specific facts of this case. In doing so, the decision will lead to rigid approaches designed to reduce the risk of liability while stifling innovation. Expanding liability will also deprive law enforcement agencies of resources they need to develop and adopt effective programs for dealing with the mentally ill.

This is not only illogical, it is unfair. Forcing police officers and departments to assume responsibility for the failures of our mental health system makes no sense. Officers are not psychiatrists, psychologists, or social workers. And the law does not and should not expect them to be. Ultimately, the burden of the Ninth Circuit's decision will fall upon the local government entities – many of them represented by *amici curiae* – and the residents they serve. Accordingly, *amici curiae* respectfully request that this Court grant the writ and reverse the judgment.

III. BACKGROUND

Police officers "ha[ve] been responding to calls for service that involve the mentally ill throughout the history of the profession." Abigail S. Tucker, et al., *Law Enforcement Response to the Mentally Ill: An Evaluative Review*, 8 Brief Treatment & Crisis Intervention 236, 236 (2008). "All too often, individuals' inadequately treated mental illnesses are manifested in ways that can result in their contact with law enforcement – sometimes with tragic results." Melissa Reuland, et al., *Law Enforcement Responses to People with Mental Illnesses: A Guide to Research-Informed Policy and Practice* 3 (2009).

In recent years, police encounters with the mentally ill have skyrocketed as the number of persons with severe mental illness in the community has grown. And in communities nationwide, police have become the de facto first responders to incidents involving the mentally ill.

To meet these extraordinary challenges, law enforcement agencies are developing specialized programs for responding to persons with mental illness. However, creating a standardized procedure for "police response to the mentally ill is problematic" because the characteristics, propensity for violence, and needs of the mentally ill vary greatly. Tucker, et al., *supra*, at 245. And the impact of existing programs on the frequency and severity of injury during police encounters with the mentally ill is not clear.

A. Local Law Enforcement Encounters With Mentally Ill Persons Are Increasing.

Over the past decades, the frequency of police encounters with the mentally ill has increased. E. Fuller Torrey, et al., *Justifiable Homicides by Law Enforcement Officers: What Is the Role of Mental Illness* 4 (2013). This has been traced to "deinstitutionalization" that began in the 1960s, through which mentally ill persons who were formerly confined within locked institutions were released, and the limited availability of treatment services for those persons when they began living in the community. *See* Tucker, et al., *supra*, at 237; Reuland, et al., *supra*, at 4; Torrey, et al., *supra*, at 7-8.

1. The number of persons with serious mental illnesses has been steadily increasing, and most do not receive treatment.

The prevalence of mental disorders in the United States has risen over the past decades. Currently, "[o]ne in four adults – about 61.5 million Americans – experiences mental illness in a given year." National Alliance on Mental Illness ("NAMI"), *Mental Illness Facts and Numbers* (2013). One in 17 adults – about 13.6 million Americans – "live with a serious mental illness such as schizophrenia, major depression, or bipolar disorder." *Id.* And "[a]bout 9.2 million adults have co-occurring mental health and addiction disorders." *Id.* "Approximately 20 percent of state prisoners and 21 percent of local jail inmates have 'a recent

history' of a mental-health condition." *Id.* And about 60 percent of adults with a mental illness "received no mental health services in the previous year." *Id.* Indeed, "most people with a mental disorder do not receive treatment. " Ronald C. Kessler, et al., *US Prevalence and Treatment of Mental Disorders: 1990-2003*, 352 New Engl. J. Med. 2515, 2522 (2005).

2. Since the 1960s, deinstitutionalization has increased the number of mentally ill persons living in the community.

The introduction of psychiatric medications and subsequent changes in the treatment of mental illness have dramatically reduced the percentage of mentally ill persons in psychiatric facilities. In 1964, Congress passed the Community Mental Health Centers and Construction Act, Pub. L. 88-164, 77 Stat. 282, which reduced the number of mentally ill persons in mental hospitals. As a result, the number of state psychiatric beds per 100,000 persons decreased from 339 in 1955 to 17 in 2005. Reuland, et al., *supra*, at 4.

The passage in 1965 of the Medicaid Act gave states further incentive to move patients out of psychiatric hospitals and into the community by limiting reimbursements to inpatient mental health facilities. *See Connecticut Dept. of Maintenance v. Heckler*, 471 U.S. 524, 533 (1985) (Medicaid program excluded coverage for patients under 65 in institutions for mental disease "based on the view that long-term care in

mental institutions was a state responsibility"). This process of deinstitutionalization resulted in the movement of thousands of persons with severe mental illness from hospitals into the community. Reuland, et al., *supra*, at 4.

3. Resources for the treatment of mentally ill persons have been significantly reduced in recent years.

Despite the release of thousands of persons with mental illness into the community, "adequate community-based services to pick up the slack were never provided. This vacuum persists to this day." Gary Cordner, *People with Mental Illness*, Problem Oriented Guides for Police, Problem-Specific Guides Series No. 40, May 2006, at 7. Even in communities like Santa Clara County, King County, and the City and County of San Francisco, where substantial public resources have been devoted to mental health services, police frequently must respond to violent mentally ill persons.

Moreover, in recent years, states have made drastic cuts to their mental health budgets. From 2009 through 2012, states cut more than $1.6 billion in mental health services. California alone cut $764.8 million in mental health services. NAMI, *State Mental Health Cuts: The Continuing Crisis* at 2 (2011).

These cuts have resulted in "the loss of services for the most vulnerable residents living with serious

mental illnesses." *Id.* at 3. For example, "both inpatient and community services for children and adults living with serious mental illness have been downsized or eliminated. In some states, entire hospitals have been closed; in others, community mental health programs have been eliminated." *Id.*

These drastic cuts to mental health services have further increased the number of persons in the community with serious mental illnesses who do not receive adequate treatment. As a result, "emergency rooms, homeless shelters, and jails are struggling with the effects of people falling through the cracks due to lack of needed mental health services." *Id.* at 1.

B. Police Have Become The De Facto First Responders For Mental Illness.

The dramatic rise in the number of persons with untreated mental illnesses living in the community has transformed local police into first responders for the mentally ill. Reuland, et al., *supra*, at 3; Torrey, et al., *supra*, at 4. Recognizing that dangerous behavior by mentally ill persons often warrants a law enforcement response, every state has adopted legislation authorizing police to take into custody mentally ill persons who are a danger to themselves or others.[2]

---

[2] *See* ALA. CODE §22-52-91; ALASKA STAT. §47.30.705; ARIZ. REV. STAT. §36-529; ARK. CODE ANN. §20-47-210; CAL. WELF. & INST. CODE §5150; COLO. REV. STAT. §27-65-105; CONN. GEN.

(Continued on following page)

Thus, local police have become the "first-line, around-the-clock, emergency responders, mediators, referral agents, counselors, youth mentors, crime prevention actors, and much more." Reuland, et al., *supra*, at 3. And "calls to the police about crimes and disorder involving people with mental illness [have] increased." Cordner, *supra*, at 8. Indeed, the frequency of police encounters with mentally ill persons are "high." Tucker, et al., *supra*, at 238. For example, 28 California counties reported more than 597,000 detentions of persons determined to be a danger to themselves, a danger to others, or gravely disabled from 2000 to 2007. Tim A. Bruckner, Jangho Yoon, Timothy T.

STAT. §17A-503; DEL. CODE ANN. tit. §5122; FLA. STAT. §394.463; GA. CODE ANN. §37-3-41; HAW. REV. STAT. §334-59; IDAHO CODE §66-326; 405 ILL. COMP. STAT. 5/3-606; IND. CODE ANN. §12-26-4-1; IOWA CODE ANN. §229.22; KAN. STAT. ANN. §59-2953; KY. REV. STAT. ANN. §202A.041; LA. REV. STAT. ANN. §28:53; ME. REV. STAT. tit. 34, §3862; MD. CODE ANN., HEALTH-GEN. §10-624; MASS. GEN. LAWS ANN. CH. 123 §12; MICH. COMP. LAWS. ANN. §330.1427; MINN. STAT. ANN. §253B.05; MISS. CODE ANN. §41-21-67; MO. ANN. STAT. §632.300; MONT. CODE ANN. §53-21-129; NEB. REV. STAT. ANN. §71-919; NEV. REV. STAT. ANN. §433A.160; N.H. REV. STAT. ANN. §135-C:29; N.J. STAT. ANN. §30:4-27.6; N.M. STAT. ANN. §43-1-10; N.Y. MENTAL HYG. LAW §9.41; N.C. GEN. STAT. ANN. §122C-262; N.D. CENT. CODE ANN. §25-03.1-25; OHIO REV. CODE ANN. §5122.10; OKLA. STAT. ANN. tit. 43A, §5-207; OR. REV. STAT. ANN. §426.228; 50 PA. CONS. STAT. ANN. §4405; R.I. GEN. LAWS §40.1-5-7; S.C. CODE ANN. §44-178-440; S.D. CODIFIED LAWS §27A-10-3; TENN. CODE ANN. §33-6-402; TEX. HEALTH & SAFETY CODE ANN. §573.001; UTAH CODE ANN. §62A-15-629; VT. STAT. ANN. tit. 18, §7505; VA. CODE ANN. §37.1-67.01; WASH. REV. CODE §71.05.150; W. VA. CODE ANN. §9-6-5; WIS. STAT. ANN. §51.20; WYO. STAT. ANN. §25-10-109.

Brown & Neal Adams, *Involuntary Civil Commitments After the Implementation of California's Mental Health Services Act*, 61 Psychiatric Services 1006, 1007-08 (2010) (analyzing California Dept. of Mental Health data).

In responding to these calls, police must deal with many different mental illnesses – ranging from schizophrenia to major depression to bipolar disorder to post-traumatic stress disorders. Cordner, *supra*, at 238. Further, "the people with mental illness the police encounter are likely to have substance abuse problems." *Id.* at 7; *see also* Peter H. Silverstone, et al., *A Novel Approach to Training Police Officers to Interact with Individuals Who May Have a Psychiatric Disorder*, 41 J. Am. Acad. Psychiatry & L. 344, 344 (2013) ("Individuals with various psychiatric problems, including addictions, depression, and schizophrenia, have an increased probability of coming into contact with police."). These include "calls for service that involve people with mental illnesses whose violent behavior is at issue." Reuland, M., et al., *supra*, at 6. Many are "at risk of harming themselves," *id.* at 6, and incidents of "suicide-by-cop" – where a mentally ill person commits suicide by attacking police officers – appear to be increasing. Torrey, et al., *supra*, at 7. Other evidence suggests that "responding to a call involving a person with mental illness may be among the most dangerous" duties of police officers. Amy Kerr, et al., *Police Encounters, Mental Illness and Injury: An Exploratory Investigation*, 10 J. Police Crisis Negot. 116, 117 (2010).

C. Although Law Enforcement Agencies Are Developing Specialized Programs For Dealing With The Mentally Ill, Those Efforts Are Constrained By Limited Resources And Differing Needs.

To address the challenges created by persons with mental illness, many law enforcement agencies have collaborated "with mental health providers and advocates to design specialized responses to people with mental illnesses." Reuland, et al., *supra*, at 9. Two primary models have been developed. The first, known as the Crisis Intervention Team (CIT) model, was pioneered by the City of Memphis and "trains officers to provide crisis intervention services and act as liaisons to the formal mental health system." *Id.* It is the most popular model. Michael T. Compton, et al., *A Comprehensive Review of Extant Research on Crisis Intervention Team (CIT) Programs*, 36 J. Am. Acad. Psychiatry & L. 47, 47 (2008). The second, known as the "co-responder model," "partners mental health professionals with law enforcement at the scene to provide consultation on mental-health related issues and assist individuals in accessing treatments and supports." Reuland, et al., *supra*, at 9. This model may include "police-based mental health responses, in which the police department hires mental health consultants to assist with mental health crisis calls, and mental-health based specialized responses, which are typified by mobile crisis units." Compton, et al., *supra*, at 47.

More and more law enforcement agencies are creating specialized programs for dealing with persons with mental illnesses. Reuland, et al., *supra*, at 9; Tucker, et al., *supra*, at 245. But they are still the exception. "Few law enforcement agencies or their training programs will have the internal capacity or expertise to teach the entire range of topics that first responders require when working with people with mental illnesses." Melissa Reuland & Matt Schwarzfeld, *Improving Responses to People with Mental Illnesses: Strategies for Effective Law Enforcement Training* at 9 (2008). And "[n]ot all communities will have an adequate pool of local experts who can provide aspects of this training to officers" or "the funds to coordinate a training initiative, including expenses related to contracting with trainers." *Id.*

This is particularly true for smaller law enforcement agencies where neither model may be feasible or effective. *See* Cordner, *supra*, at 26-27. Mental health providers may not be available in the jurisdictions protected by those agencies. *Id.* at 27. Indeed, "sufficient social work/mental health resources are rarely available to provide prompt mobile response to a majority of incidents." *Id.* at 38. Thus, "a standardized procedure or 'model' for police response to the mentally ill is problematic." Tucker, et al., *supra*, at 245. And even in jurisdictions that have adopted these specialized models, "the types of training vary widely in nature, design, duration, and timing." Silverstone, et al., *supra*, at 344.

D. The Impact Of These Specialized Programs On The Rate And Severity Of Injuries During Police Encounters With The Mentally Ill Is Unclear.

The impact of specialized law enforcement programs for responding to persons with mental illness on the use of force and injuries is "unclear." Kerr, et al., *supra*, at 120. "[N]o published studies have examined [CIT's] impact on injuries." *Id.* And "there has been very little research about the best training approaches." Silverstone, et al., *supra*, at 344. Thus, "there are no currently accepted models that appear to have reproducibly positive outcomes." *Id.* at 345. Indeed, consistent with studies suggesting that "specific training on de-escalation techniques may not decrease the number or severity of physical interactions between individuals with mental illness and health care providers," *id.* at 344, at least one study suggests that "CIT training appears to have no effect on injuries in police encounters with people with mental illness," Kerr, et al., *supra*, at 129.

This may reflect the fact that the rate of injury in police encounters with people with mental illness "is similar to their rate of occurrence in police encounters with members of the general population." *Id.* And "the type of injuries [experienced in police encounters with mentally ill persons] mirror those experienced in the general population." *Id.* Indeed, "the criminal justice literature overwhelmingly suggests that *situational factors* are the most predictive of the outcomes of these encounters *rather than characteristics of the*

individual." *Id.* at 119 (emphasis added). Thus, specialized programs designed to improve police encounters with the mentally ill – which may be beneficial for other reasons[3] – may not reduce the risk of injury.

IV. REASONS FOR GRANTING THE PETITION

In this case, the Ninth Circuit Court of Appeals extended liability under the ADA to local governments whose police officers use force deemed reasonable under the Fourth Amendment. That court also held that officers may be liable under 42 U.S.C. §1983 for the use of reasonable force in cases where an expert questions the tactical decisions leading up to the use of force. Under the Ninth Circuit's decision, police officers and law enforcement agencies may therefore incur substantial legal costs and liability even when officers act reasonably to protect themselves, innocent bystanders, or the mentally ill suspect.

If allowed to stand, this decision will jeopardize the safety of police officers, innocent bystanders, and suspects, and will ultimately harm the mentally ill. These serious consequences amplify the unfairness of imposing liability on law enforcement agencies and officers when officers act to protect the public in

---

[3] For example, "the CIT model may be an effective component in connecting individuals with mental illnesses who come to the attention of police officers with appropriate psychiatric services." Compton, et al., *supra*, at 52.

exigent circumstances involving persons with mental illnesses. In those circumstances, the reasonableness standard governing the use of force under the Fourth Amendment is more than sufficient to protect the public, including the mentally ill, from the use of unnecessary force.

For these reasons as well as the reasons articulated in the Petition, the writ should be granted and the judgment reversed.

A. Holding Law Enforcement Agencies And Officers Liable Where The Use Of Force Was Reasonable Puts Officers And The Public At Risk.

Armed and violent individuals are dangerous. And when dealing with those dangerous individuals, police officers must often make split-second decisions to protect themselves, innocent bystanders, or the suspect. *See Graham v. Connor*, 490 U.S. 386, 397 (1989). In these exigent circumstances, hesitancy and delay often have serious consequences. This is true regardless of whether the suspect has a mental illness.

Despite this, the Ninth Circuit has adopted a decision that induces hesitancy and delay by police officers when they deal with armed and violent persons with mental illnesses. It did so by creating the specter of liability for discretionary decisions made by police officers during those encounters, even when the use of force is reasonable under the Fourth

Amendment. In other words, the Ninth Circuit's decision exposes officers and their agencies to liability for *any* use of force in *any* confrontation with armed and violent persons with mental illnesses. In so doing, the decision encourages police officers to hesitate before using force or to eschew contact with mentally ill suspects in order to minimize the risk of liability.

This is exacerbated by the Ninth Circuit's decision to impose liability for failure to accommodate under the ADA and to reject qualified immunity. Police officers are not mental health professionals. And they often receive little or no information about the mental condition of an armed and violent suspect before they must confront that suspect. Moreover, standardized procedures for dealing with the wide spectrum of mentally ill suspects and exigent circumstances have proven to be impractical or ineffective. *See* Silverstone, et al., *supra*, at 345; Tucker, et al., *supra*, at 245; Cordner, *supra*, at 26-27. Despite providing minimal guidance, the Ninth Circuit now requires police officers to predict the behavior of unpredictable suspects under unpredictable circumstances. Left with no good options, police officers may be paralyzed into inaction.

This paralysis jeopardizes public safety. When confronted with armed and violent persons, officers often experience perceptual and memory distortions such as tunnel vision, time dilation, and auditory blunting. J. Peter Blair, *Reasonableness and Reaction Time*, 14 Police Q. 323, 328 (2011). As a result, even well-trained officers generally cannot react and fire

their weapons before a suspect can use deadly force against the officers or innocent bystanders – even when the officer has his gun aimed at the suspect. *Id.* at 335-36. Consistent with these findings, this Court has long held that "judges should be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation." *Ryburn v. Huff*, 132 S.Ct. 987, 991-92 (2012). By doing just that, the Ninth Circuit's decision places the health and safety of police officers and the public at serious risk.

Indeed, under the Ninth Circuit's decision, police officers are better off avoiding or delaying encounters with armed and violent persons with mental illnesses rather than attempting to neutralize the threat they pose to the public. This may not only jeopardize the safety of innocent bystanders, it will likely increase the risk of harm to the mentally ill suspect. Many police encounters with the mentally ill involve threats of suicide. Delays in engaging those persons under the auspices of offering an accommodation may increase the likelihood that they will harm themselves.

The risk of harm to police officers and the public will only increase as the number of police encounters with mentally ill suspects continues to rise. Thus, law enforcement agencies should not supplant the judgment of police officers in the field with a prescribed approach to encounters with violent, mentally ill persons in order to reasonably accommodate them. To protect public safety, officers must be able to take any necessary actions, including actions that may further

agitate the mentally ill individual, without fear of liability based on 20/20 hindsight. This Court should therefore grant the writ.

B. Holding Police Officers And Their Agencies Liable For The Use of Reasonable Force Will Stifle Innovative Approaches To Dealing With The Mentally Ill And Deprive Local Governments Of Much-Needed Resources.

Recognizing that officers often function as "armed social workers," law enforcement agencies have developed specialized programs that train officers to recognize the signs of mental illness and identify strategies for dealing with mentally ill persons. Torrey, et al., *supra*, at 9. But current research on these programs is limited, and "the best methods for educating the police force remain uncertain." Silverstone, et al., *supra*, at 344. Indeed, "there are no currently accepted models that appear to have reproducibly positive outcomes." *Id.* at 345. Moreover, studies suggest that specialized programs may have no effect on injuries experienced during police encounters with the mentally ill. *See, e.g.*, Kerr, et al., *supra*, at 129.

Despite this, the Ninth Circuit held that police officers and agencies may be held liable for the reasonable use of force when officers fail to take "reasonable" steps to de-escalate encounters with mentally ill persons under the ADA and the Fourth Amendment. *Sheehan v. City and County of San Francisco*, 743

F.3d 1211, 1216-17 (9th Cir. 2014). Specifically, the Ninth Circuit suggested that the officers "should have respected her comfort zone, engaged in non-threatening communications and used the passage of time to defuse the situation rather than precipitating a deadly confrontation." *Id.* at 1233. In doing so, the Ninth Circuit appears to imply that there is a one-size-fits-all approach that will reduce the risk of injury during police encounters with mentally ill persons who are armed and violent.

But there are currently no evidence-based models for reducing injury during police encounters with mentally ill persons. *See* Silverstone, et al., *supra*, at 345; Kerr, et al., *supra*, at 129. And the wide spectrum of mental illnesses that police encounter combined with the wide range of crisis situations that may arise make a standardized approach ineffective and impractical. *See* Tucker, et al., *supra*, at 245. As a result, the Ninth Circuit's decision will likely result in the adoption of "best practices" based on litigation risk, rather than empirical evidence. And those best practices will likely include rigid approaches designed to avoid liability rather than reduce injury and improve outcomes.

At the same time, the decision will discourage innovative approaches to police encounters with the mentally ill. Because the use of unproven approaches may subject law enforcement agencies to liability under the Ninth Circuit's holding, those agencies will be reluctant to try new approaches for dealing with

the mentally ill. Yet, those approaches may be the key to improving outcomes.

Even more troubling, the Ninth Circuit's decision, by creating new grounds for liability, will deprive local governments of funds they need to develop and adopt specialized programs for dealing with the mentally ill. Cities and counties already "spend large sums of money to defend themselves against lawsuits when the officer is ultimately exonerated and the shooting is ruled justifiable." Blair, et al., *supra*, at 325. Exposing those cities and counties to liability when the use of force is reasonable will only increase the amount of money that they must devote to defending lawsuits, rather than treating the mentally ill.

The harm to jurisdictions with small police forces is especially pernicious. Many lack the capacity, expertise and funds to train their police officers and do not have access to the mental health resources needed to deal effectively with the mentally ill. Reuland & Schwarzfeld, *supra*, at 9. Moreover, many of the more accepted approaches to dealing with the mentally ill like CIT may not be suitable or effective for small jurisdictions. Cordner, *supra*, at 26-27. These jurisdictions have the greatest need for innovative approaches and resources to implement those approaches. Thus, the Ninth Circuit's decision will have a disproportionate impact on jurisdictions that can least afford it.

The proper approach to police encounters with mentally ill persons who are armed and violent should not be determined through litigation. By subjecting police officers and their agencies to liability when the use of force is reasonable, the Ninth Circuit's decision does just that. Accordingly, this Court should grant the writ and reverse the judgment.

C. The Ninth Circuit's Decision Unfairly Shifts Responsibility For Treating Mentally Ill Persons To Local Law Enforcement.

Successful treatment of the mentally ill depends on many factors, including adherence to treatment regimens; effective case management; the availability of inpatient and outpatient treatment; provision of structured housing; and support from family and community members. When police officers are called to a crisis situation involving an armed and violent suspect with a mental illness, that suspect is usually untreated or the treatment has failed. Police often have limited information about the suspect's mental illness and current state of deterioration, and often have limited options for handling the situation. *See* Tucker, et al., *supra*, at 241. And in instances where injuries occur, the use of force that gave rise to those injuries may be justified based on an objective assessment of the circumstances. Blair, et al., *supra*, at 325.

The primary job of police officers is to safeguard the public and keep the peace. That is what officers are hired and trained to do. They are not mental health professionals. And they only receive limited training on dealing with the mentally ill. Torrey, et al., *supra*, at 8. Yet, police officers have been forced to play the role of social workers, psychiatrists, and psychologists. *Id.* Forcing police officers to shoulder the burden of the mental health system when injuries occur, as the Ninth Circuit has done, is simply unfair.

It is especially unfair in situations involving armed and violent suspects with mental illnesses. Those suspects may suffer from psychiatric ailments ranging from schizophrenia to psychosis to major depression to substance abuse. Cordner, *supra*, at 1. Moreover, police officers typically have limited information about the suspect's mental condition. And even if officers do know about the suspect's mental condition, they still may not know what to do. There is no standardized approach for dealing with mentally ill suspects. *See* Silverstone, et al., *supra*, at 345 & 354. And there is little or no evidence that any approach will actually reduce the risk of injury. *Id.* at 345; Kerr, et al., *supra*, at 129. Thus, as other circuits have held, to expect officers to accommodate a suspect's mental illness in a crisis situation that requires split-second judgment is not reasonable. *See Tucker v. Tennessee*, 539 F.3d 526, 536 (6th Cir. 2006), *cert. denied*, 558 U.S. 816 (2009); *Hainze v. Richards*, 207 F.3d 798, 801-02 (5th Cir.), *cert. denied*, 531 U.S. 959 (2000). Indeed, a true assessment of a suspect's

mental health needs can only occur after the suspect has been disarmed and taken into custody. Accordingly, holding police officers liable for their reasonable use of force makes no sense.

Despite this backdrop, the Ninth Circuit has subjected police officers and their agencies to liability under the ADA and Fourth Amendment even when the use of force is objectively reasonable. As a result, law enforcement agencies and officers may be held liable for the use of force *whenever an injury occurs*. The decision by the Ninth Circuit to transfer responsibility for the well-being of the mentally ill to law enforcement is unfair and misplaced.

D. Existing Fourth Amendment Limits On The Use Of Force Are Sufficient To Ensure That Mental Disabilities Are Reasonably Accommodated In Exigent Circumstances And To Protect Suspects From Unreasonable Search And Seizure.

Under the Fourth Amendment, an officer may only use any force that is reasonable to make an arrest. *Graham*, 490 U.S. at 396. Reasonableness "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* And "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and

rapidly evolving – about the amount of force that is necessary in a particular situation." *Id.* at 396-97.

This standard ensures that police officers may only use force that is objectively reasonable under the circumstances. And when those circumstances justify deadly force, officers need not use non-deadly alternatives[4] or halt their use of deadly force until the threat is over. *See Plumhoff v. Rickard*, 134 S.Ct. 2012, 2022 (2014) ("if lethal force is justified, officers are taught to keep shooting until the threat is over"). Any other standard would require officers to exercise "superhuman judgment":

> In the heat of battle with lives potentially in the balance, an officer would not be able to rely on training and common sense to decide what would best accomplish his mission. Instead, he would need to ascertain the least intrusive alternative (an inherently subjective determination) and choose that option

---

[4] Officers have no duty to retreat under California law. CAL. PENAL CODE §835a (peace officers need not retreat by reason of the resistance or threatened resistance of the arrestee); *accord State v. Allery*, 682 P.2d 312, 316 (Wash. 1984) (Washington law does not require retreat when "one is feloniously assaulted in a place where she has a right to be"). An en banc panel of the Ninth Circuit has also "reject[ed] the premise" that "in an armed standoff, once a suspect is seized by virtue of being surrounded and ordered to surrender, the passage of time may operate to liberate that suspect, re-kindle the arrest warrant requirement, and require police to assess with each passing minute whether the circumstances remain exigent." *Fisher v. City of San Jose*, 558 F.3d 1069, 1076 (9th Cir. 2009) (en banc).

> and that option only. Imposing such a requirement would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves. It would also entangle the courts in endless second-guessing of police decisions made under stress and subject to the exigencies of the moment.

Scott v. Henrich, 39 F.3d 912, 915 (9th Cir. 1994).

Thus, the existing standard governing the use of force under the Fourth Amendment already establishes what is objectively reasonable for a police officer to do during a confrontation with an armed and violent suspect who is mentally ill. Neither the ADA – which only requires reasonable accommodation – nor the Fourth Amendment – which only prohibits an unreasonable search or seizure – should require more.

The Department of Justice has already reached this conclusion. In regulations promulgated under the ADA, the Department does not require a public entity to permit an individual to participate in or benefit from its services, programs, or activities if the individual poses a "direct threat" to the health or safety of others. 28 C.F.R. §§35.139(a) & 104. This interpretation should be accorded deference especially where, as here, the ADA is silent. *Bragdon v. Abbott*, 524 U.S. 624, 646 (1998). The Ninth Circuit should have done so here. Because it did not, this Court should grant certiorari and reverse the judgment.

V. CONCLUSION

Based on the foregoing, this Court should grant the petition.

Respectfully submitted,

COUNTY OF SANTA CLARA
OFFICE OF THE COUNTY COUNSEL
ORRY KORB, County Counsel
DANNY CHOU, Assistant
County Counsel
Counsel of Record
GRETA S. HANSEN, Lead Deputy
County Counsel
MELISSA R. KINIYALOCTS,
Deputy County Counsel
70 West Hedding Street,
East Wing, 9th Floor
San Jose, California 95110
Telephone: (408) 299-5900
danny.chou@cco.sccgov.org

VANCOUVER CITY ATTORNEY'S OFFICE
DANIEL G. LLOYD,
Assistant City Attorney
P.O. Box 1995
Vancouver, Washington 98668
Telephone: (360) 487-8500
dan.lloyd@cityofvancouver.us

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
JUN 26 2014
OFFICE OF THE CLERK

No. 13-1412

IN THE
Supreme Court of the United States

CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, ET AL.,

Petitioners,

v.

TERESA SHEEHAN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* OF THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AND NATIONAL SHERIFFS' ASSOCIATION IN SUPPORT OF PETITIONERS

Sarah M. Shalf
Counsel of Record
EMORY LAW SCHOOL
SUPREME COURT
ADVOCACY PROJECT
1301 Clifton Road
Atlanta, Georgia 30322
(404) 712-4652
sarah.shalf@emory.edu

Charles W. Thompson, Jr.
Executive Director,
General Counsel
INTERNATIONAL
MUNICIPAL LAWYERS
ASSOCIATION
7910 Woodmont Ave.,
Suite 1440
Bethesda, MD 20814
(202) 466-5424

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTERESTS OF THE *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 3

I. TITLE II OF THE ADA REQUIRES CAREFUL ANALYSIS OF APPROPRIATE ACCOMMODATIONS IN LIGHT OF AVAILABLE RESOURCES 5

A. The ADA Was Passed to Address Policies Impacting the Disabled. 6

B. Title II of the ADA is Addressed to Public Entities' Policies and Procedures, Rather Than to Individuals' Actions. 7

II. QUALIFIED IMMUNITY AND FOURTH AMMENDMENT JURISPRUDENCE ALLOW LAW ENFORCEMENT TO EXERCISE MAXIMUM DISCRETION IN ARREST SETTINGS. 10

A. The Court Established Qualified Immunity in Order to Give Wide Berth to Officers Making Split-Second Decisions 10

B. Substantive Law Regarding the Constitutionality of Arrests Provides an Additional Layer of Protection for Officers' Discretion. 13

III. APPLICATION OF THE ADA IN THE CONTEXT OF ARRESTS UNDULY RESTRICTS THE ESTABLISHED DISCRETION OF POLICE OFFICERS. 15

A. Successful Mental Health Crisis Intervention Models Relv Heavilv on the Availabilitv of Local Resources. and Must Be Implemented Based on Careful Consideration at the Agency Level 16

B. Application of the ADA in the Arrest Context is Inconsistent with the Discretion Traditionally Afforded Law Enforcement Officers. 19

CONCLUSION 22

TABLE OF AUTHORITIES

CASES

Ashcroft v. al-Kidd,
131 S.Ct. 2074 (2011)..... 12

Bahl v. Cnty. of Ramsey, 695 F.3d 778
(8th Cir. 2012)..... 20

Graham v. Connor,
490 U.S. 386 (1989)..... 4, 13, 14, 21

Harlow v. Fitzgerald, 457 U.S. 800
(1982)..... 12

Hill v. California, 401 U.S. 797 (1971)..... 13

Maryland v. Garrison,
480 U.S. 79 (1987)..... 13

Michigan v. Summers, 452 U.S. 692
(1981)..... 13

Olmstead v. L.C. ex rel. Zimring,
527 U.S. 581 (1999)..... 4, 7, 8, 9

Plumhoff v. Rickard,
134 S.Ct. 2012 (2014)..... 4

Saucier v. Katz, 533 U.S. 194 (2001) 13, 14, 15

Scheuer v. Rhodes, 416 U.S. 232 (1974). 10, 11, 12

Scott v. Harris, 550 U.S. 372 (2007). 14

Sheehan v. City & Cnty of San Francisco, 743 F.3d 1211 (9th Cir. 2014)..... 3, 17, 20

Tennessee v. Garner, 471 U.S. 1 (1985). 14

Wilson v. Layne, 526 U.S. 603 (1999)..... 13

STATUTES, RULES AND REGUATIONS

28 C.F.R. § 35.130(b)(7) (2014)..... 7

42 U.S.C. § 1983 ..... 3, 9

Americans with Disabilities Act of 1990, Pub. L. No. 110-336, 104 Stat. 328 (1990) (codified as amended at 42 U.S.C. §§ 12101 et seq. (2012))..... 6

Supreme Court Rule 37.2..... 1

Supreme Court Rule 37.6..... 1

OTHER AUTHORITIES

Amy C. Watson et al., CIT in Context: *The Impact of Mental Health Resource Availability and District Saturation on Call Dispositions.* 34(4) INT'L. J. L. PSYCHIATRY 287 (2011). 18

Census of State and Local Law Enforcement Agencies 2008, Bureau of Justice Statistics, http://www.bjs.gov/index.cfm?ty=pbdetail&iid=2216 (last visited 6/24/2014) 18

Henry J. Steadman et al., *A Specialized Crisis Response Site as a Core Element of Police-Based Diversion Programs*, 52(2) PSYCHIATRIC SERVICES 219 (2001)..... 17

INT'L ASS'N OF CHIEFS OF POLICE NAT'L LAW ENFORCEMENT POLICY CTR., *Responding To Persons Affected by Mental Illness or in Crisis* (Jan. 2014). 17

Liz Navratil and Paula Reed Ward, *Mental Illness in Crime Suspects Gives Police Special Problems.* PITTSBURGH POST-GAZETTE, February 7, 2014 21

INTERESTS OF THE *AMICI CURIAE*[1]

The International Municipal Lawyers Association (IMLA) is a non-profit, nonpartisan professional organization consisting of more than 2500 members. The membership is comprised of local government entities, including cities, counties and subdivision thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties and special districts.

IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues

---

[1] Pursuant to Supreme Court Rule 37.6 *amici curiae* affirm that no counsel for a party authored this brief in whole or in part, that no counsel or a party made a monetary contribution intended to the preparation or submission of this brief and no person other than *amici curiae*, their members, or their counsels made a monetary contribution to its preparation or submission.

Pursuant to Supreme Court Rule 37.2, the Respondents and the Petitioners received at least 10-days' notice of the intent to file this brief under the Rule, each party has consented to the filing of this brief, and copies of the consents are on file with the Clerk of the Court.

before the United States Supreme Court, the Unites States Courts of Appeals, and in state supreme and appellate courts.

The National Sheriffs' Association (the "NSA") is a non-profit association organized under § 501(c)(4). Formed in 1940, the NSA seeks to promote the fair and efficient administration of criminal justice throughout the United States, and, in particular, to advance and protect the Office of Sheriff throughout the United States. The NSA has over 20,000 members, and is the advocate for 3,083 sheriffs throughout the United States.

The NSA also works to promote the public interest goals and policies of law enforcement throughout the nation. It participates in judicial processes where the vital interests of law enforcement and its members are affected.

SUMMARY OF THE ARGUMENT

The ADA was intended to address not only intentional discrimination but the discrimination that occurs when policies and methods of service delivery are enacted by those who unthinkingly fail to consider the impact on the disabled. The ADA requires public entities to ensure their programs are accessible. However, the careful consideration required to avoid unintentional barriers is designed to occur at the level of resource management and policy.

By contrast, this Court's jurisprudence with respect to law enforcement actions in arrests affords officers broad discretion in their good-faith, reasonable decision-making based on the facts available at the moment, even if the decision appears incorrect in hindsight. The best method of accommodating the mentally ill, and equipping law enforcement officers to handle confrontations with the mentally ill safely, is to provide specialized training calibrated to local resources and needs. However, once that training is provided, individual officers should not be required to perform an ADA accommodations analysis, but rather should be afforded the broad discretion traditionally afforded under 42 U.S.C. § 1983.

ARGUMENT

Sheehan v. City & Cnty of San Francisco, 743 F.3d 1211 (9th Cir. 2014), puts before the Court an important issue involving the interaction between a federal law and the day to day responsibilities of the men and women who risk their lives to enforce law and protect the public. The Ninth Circuit's decision wrongly extends ADA analysis to life threatening confrontations between officers and the mentally disabled in a way that jeopardizes those officers and the public. The case forms the perfect tablet upon which this Court can define the reach of the ADA as it applies to the law of arrest.

The ADA was intended to reach beyond intentional discrimination by requiring entities to affirmatively ensure that their programs are

accessible and provided in the most integrated setting possible. However, this is not an absolute requirement. Rather, it involves careful consideration of the accommodations that are appropriate and reasonable in light of the entire budget available to the entity, but that would still accomplish the underlying goal of the program. As demonstrated in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), this can be a complicated multifactor analysis assessing the needs of the disabled individual in light of the entire program offered by the entity.

By contrast, traditionally, this Court's § 1983 and Fourth Amendment jurisprudence has been grounded in deference to officers' "split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving." *Graham v. Connor*, 490 U.S. 386, 397 (1989). Deference also includes a consideration of the safety of officers under threat, and awareness of the effect of hindsight on a court's evaluations of the wisdom of officers' actions. *Plumhoff v. Rickard*, 134 S.Ct. 2012, 2020-22 (2014).

Application of the Americans with Disabilities Act of 1990 ("ADA") to decision-making as applied to an arrest would demand that an officer deliver, in a matter of seconds, the considered accommodations of a clinical setting anticipated under Title II, when it would be more appropriate to adopt necessary programs in settings in which a locality can develop a policy of appropriate accommodations with studied deliberation. As officer training and mental health collaborative models continue to grow in impact and

effectiveness, municipalities and counties are the best equipped to design effective crisis response systems for their communities and it is those models that effect the accommodations demanded by the ADA. The ADA does not, and should not, fundamentally alter the principle that officers confronted with life-threatening circumstances must exercise the discretion this Court has granted them in emergency situations, for their protection and that of the public.

I. TITLE II OF THE ADA REQUIRES CAREFUL ANALYSIS OF APPROPRIATE ACCOMMODATIONS IN LIGHT OF AVAILABLE RESOURCES

Congress enacted Title II of the ADA to eradicate discrimination against individuals with disabilities by requiring state and local governments to make reasonable accommodations for persons with disabilities and to provide services in the most integrated setting appropriate. The evaluation of an entity's plan for providing services to mentally disabled individuals allows the entity to weigh such factors as the cost of treatment, the entity's budget, and the need for even-handed distribution of services to other disabled individuals. This analysis occurs at the level of policymaking, management and training, and is not suited for application to individual, on-the-street decision-making.

A. The ADA Was Passed to Address Policies Impacting the Disabled.

Seeing the limited effect of prior disability rights legislation in addressing discriminatory practices and policies, Congress expanded protection for individuals with disabilities by passing the ADA in 1990. Americans with Disabilities Act of 1990, Pub. L. No. 110-336, § 2(b), 104 Stat. 328 (1990) (codified as amended at 42 U.S.C. §§ 12101 et seq. (2012)). The Rehabilitation Act of 1973 had made some steps toward eradication of discrimination, but it only applied to governmental programs and services that received public funding. The U.S. Commission on Civil Rights concluded that "[d]espite some improvements [discrimination] persists in such critical areas as education, employment, institutionalization, medical treatment, involuntary sterilization, architectural barriers, and transportation." S. Rep. No. 101-116, at 8 (1989).

The ADA was enacted in 1990 to eliminate policies and procedures, as well as architectural barriers, that had continued discriminatory effect in these broader areas. Section 2(b) of the Act states that the purpose of the ADA is "to provide a national mandate to eradicate discrimination, to provide standards for addressing discrimination, to ensure the Federal Government has a central role in enforcing said standards." S. Rep. No. 101-116, at 2 (1989). The ADA outlined several areas in which it sought to protect against discrimination, including employment, public accommodations and services

operated by private entities, and, as relevant here, Title II relating to public services. *Id.* at 2-3.

B. Title II of the ADA is Addressed to Public Entities' Policies and Procedures, Rather Than to Individuals' Actions.

Title II of the ADA, which covers Public Services, applies to any department or instrumentality of State or local government. 42 U.S.C. §§ 12131-12132 (2012). Under Title II, public entities cannot exclude from participation, deny, or discriminate in regards to public benefits, programs, and activities on basis of disability. *Id.* Notably, the language of the statute is focused on the decisions and policies of the public entity: "[N]o qualified individual with a disability shall, by reason of such disability, ... be subjected to discrimination *by any such entity*." 42 U.S.C. § 12132 (emphasis added).

Further supporting the notion that the ADA is directed to agency-level decision-making, the Attorney General promulgated regulations requiring public entities to "make reasonable modifications" to its "policies, practices or procedures" to avoid "discrimination on the basis of disability." 28 C.F.R. § 35.130(b)(7) (2014). These regulations do not require measures that would "fundamentally alter" the nature of the entity's programs. *Id. See Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 591-92, 599-600

(1999). All of these regulations are stated in terms of what the "public entity" must or may not do.[2]

The mode of analysis of reasonable accommodations is designed for an entity's management-level assessment, in light of an overall view of the entity's programs. This Court has recognized that, while government agencies cannot avoid providing appropriate services to the mentally ill altogether based on budget concerns, they may demonstrate ADA compliance by establishing a carefully considered plan that might not provide immediate appropriate treatment for everyone who qualifies. In *Olmstead v. L.C.*, when two developmentally disabled women with mental illness sought to be moved from Georgia's public psychiatric hospital into community care, for which they had been evaluated and had been determined to be qualified, the state's essential defense was a cost-based defense: that moving these women into community care was impracticable given the state's mental health budget. *Olmstead*, 527 U.S. at 593-96 & n.7. Thus, the state reasoned, it was not discriminating against the plaintiffs "by reason of disability." *Id.* at 598. Instead, the state was making a decision by reason of the cost of community treatment. *Id.* at 598.

---

[2] Granted, *respondeat superior* may apply to the actions of individual employees, but under *respondeat superior*, the focus is still on actions of the agency *through* its individual employees.

In rejecting this reasoning, the Court held that "Congress had a more comprehensive view of the concept of discrimination advanced in the ADA." *Id.* at 598. Notably, the Court observed that "Title II provides only that 'qualified individual[s] with a disability' may not 'be subjected to discrimination.'" *Id.* at 602. In *Olmstead*, the State's professionals had the opportunity to evaluate both plaintiffs and had determined that a less restrictive treatment setting was appropriate. *See id.* However, once individuals with mental disabilities are found to be "qualified" for less restrictive care, failing to do so is discrimination by reason of disability, unless, "in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities." *Id.* at 604. Determining whether this defense applies requires case-by-case assessment of the cost of the treatment against the state's overall mental health budget. *Id.* A court must also assess as the state's plan for maintaining a range of treatment facilities and its need to administer facilities with an even hand. *Id.*

Accordingly, Title II of the ADA, and its implementing regulations, was aimed at eradicating public entities' policies and procedures that have the effect of excluding individuals from programs or discriminating on the basis of disability. The language of the statute and the regulations, and the jurisprudence interpreting the ADA, all of which focus on the actions and policies of the entity, stand

in stark contrast to § 1983, in which the focus of the analysis is on the actions of individuals.

II. QUALIFIED IMMUNITY AND FOURTH AMMENDMENT JURISPRUDENCE ALLOW LAW ENFORCEMENT TO EXERCISE MAXIMUM DISCRETION IN ARREST SETTINGS.

This Court's qualified immunity jurisprudence is grounded in the recognition that active executive decision-making is essential to the public interest. Fourth Amendment jurisprudence reiterates this principle by underscoring that police officers, in addition to receiving qualified immunity, are entitled to wide discretion in making an arrest, especially when the suspect is armed and poses a risk of harm to the public. Application of the ADA's thoughtful, entity-wide analysis to an individual officer's split-second decision-making during an arrest is inconsistent with the entity-focused analysis of the ADA and the broad discretion this court has typically granted to individual officers on the street.

A. The Court Established Qualified Immunity in Order to Give Wide Berth to Officers Making Split-Second Decisions

This Court has found that "one policy consideration seems to pervade the analysis [of immunity for executive action]: the public interest requires decisions and action to enforce laws for the protection of the public." *Scheuer v. Rhodes*, 416 U.S. 232, 241 (1974). Within this consideration, this Court

recognizes that, even though officers will not always make decisions that lead to positive outcomes, the correct analysis involves a consideration of the reasonableness of the officers' actions at the time of occurrence, in light of the facts known at that time.

Deference is a key part of the Court's immunity jurisprudence: "Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err." *Id.* at 242. By allowing for some margin of error, the Court avoids a chilling effect on law enforcement. *See id.* ("The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all."). This is especially important because in situations where officers can only rely on second-hand information, and are then forced to make split-second decisions, the appropriate response may be unclear even in hindsight. *See id.* at 246-247 ("When a condition of civil disorder in fact exists, there is obvious need for prompt action, and decisions must be made in reliance on factual information supplied by others. ... Decisions in such situations are more likely than not to arise in an atmosphere of confusion, ambiguity, and swiftly moving events and when, by the very existence of some degree of civil disorder, there is often no consensus as to the appropriate remedy.").

Scheuer accordingly recognized a "qualified immunity" for executive branch officers, "the variation being dependent upon the scope of discretion and responsibilities of the office and all

the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct." *Id.* at 247-48.

The situation at Kent State addressed in *Scheuer* involved decisions by the governor and his aides, who had a high level of both responsibility and discretion. But the Supreme Court reaffirmed the concept of qualified immunity in *Harlow v. Fitzgerald*, stating more specifically that government officials "performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. 800, 818 (1982). Indeed, only when every "reasonable official would have understood that what he is doing violates that right," would the officer be held liable for his official actions. *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2078 (2011).

In sum, in the context of civil rights actions, it has been the policy of this Court to afford broad discretion to the actions of individual officers in order to facilitate quick, even if imperfect, decision making.

B. Substantive Law Regarding the Constitutionality of Arrests Provides an Additional Layer of Protection for Officers' Discretion.

Deference to officers' discretion is particularly strong in the context of arrest. Not only are officers afforded qualified immunity when exercising discretionary duties relating to an arrest,[3] but also the reasonableness of the arrest itself – the underlying Fourth Amendment claim[4] – is judged based "from the perspective of a reasonable officer on the scene," rather than an officer with perfect knowledge of all facts. *Graham*, 490 U.S. at 396. The fact that the officer's instincts turned out to be incorrect does not render the actions illegal. "The Fourth Amendment is not violated by an arrest based on probable cause, even though the wrong person is arrested, *Hill v. California*, 401 U.S. 797 (1971), nor by the mistaken execution of a valid search warrant on the wrong premises, *Maryland v. Garrison*, 480 U.S. 79 (1987)." *Id.* Additionally, the Fourth Amendment provides significant leeway for officers' decision-making in the interest of public safety and preservation of evidence, based on the officer's reasonable, articulable belief. It permits

---

[3] *See Wilson v. Layne*, 526 U.S. 603 (1999) (finding that a media ride-along in an arrest violated the Fourth Amendment, but finding the officers entitled to qualified immunity).

[4] *See Saucier v. Katz*, 533 U.S. 194 (2001) (finding that the reasonableness inquiry for the underlying Fourth Amendment claim is separate from the qualified immunity determination).

officers to detain suspects briefly in order to investigate information amounting to less than probable cause, or to detain occupants of a house temporarily to safely effectuate a search warrant. *Michigan v. Summers*, 452 U.S. 692, 699-703 (1981).

In particular, as to excessive force claims, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-97. It is important to note that hindsight should not affect a court's decision: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," violates the Fourth Amendment. *Id.* at 396; *see also Saucier v. Katz*, 533 U.S. 194, 205 (2001) ("If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed.").

The deference afforded to officers in excessive force cases is especially clear when the suspect possessed a weapon or had harmed another individual. As this Court pointed out, "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm," deadly force is authorized. *Tennessee v. Garner*, 471 U.S. 1, 11-12 (1985). When a suspect is endangering the lives of others, officers are not obligated to select the "safe" option of

inaction over an action that is potentially deadly to the suspect but that is certain to end danger to bystanders. *See Scott v. Harris*, 550 U.S. 372, 385 (2007) ("We think the police need not have taken that chance [that the suspect would have stopped driving recklessly if the pursuit ended] and hoped for the best.").

Thus, in excessive force cases, as with all cases challenging the constitutionality of an arrest, "in addition to the deference officers receive on the underlying constitutional claim, qualified immunity can apply in the event the mistaken belief was reasonable." *Saucier*, 533 U.S. at 206. This deference is crucial to enabling officers to act based on the information available to them in the moment, without fear of liability constraining their willingness to make difficult decisions, including the use of potentially deadly force.

III. APPLICATION OF THE ADA IN THE CONTEXT OF ARRESTS UNDULY RESTRICTS THE ESTABLISHED DISCRETION OF POLICE OFFICERS.

Application of the ADA to law enforcement agencies at the policy and training level provides for a calibrated level of municipal discretion. This discretion is consistent with the principles undergirding municipal liability and provides the type of considered accommodation required by the ADA. Municipalities have provided accommodation, in part, by successfully developing and implementing mental health crisis response programs, but the

nature of these programs is largely dependent on other locally-available resources beyond the law enforcement agency's control.

While application of the ADA in the law enforcement context is appropriate at the policy level, it should not extend to individual officers' decisions in confrontations between the police and the mentally ill. Application of the ADA to the arrest context would strip officers of the discretion afforded them under this Court's § 1983 jurisprudence.

A. Successful Mental Health Crisis Intervention Models Rely Heavily on the Availability of Local Resources, and Must Be Implemented Based on Careful Consideration at the Agency Level.

As an initial matter, *amici* do not contend that the ADA does not apply at all to the manner in which law enforcement handles confrontations with mentally ill suspects, but rather that it applies to the agency's decision-making regarding policies and training rather than that of individual officers on the street.

Law enforcement agencies have been sensitive to the needs of individuals with mental illness by providing training of officers and collaboration with mental health providers, in large part because it enhances the safety of their officers and the public. In January 2014, the International Association of Chiefs of Police (the "IACP") developed and released a model policy, which reminds officers that they

must "make difficult judgments about the mental state and intent of the individual [and] use . special police skills, techniques, and abilities to effectively and appropriately resolve the situation." INT'L ASS'N OF CHIEFS OF POLICE NAT'L LAW ENFORCEMENT POLICY CTR., *Responding To Persons Affected by Mental Illness or in Crisis* (Jan. 2014). The considerations that the IACP included in the policy are reflective of the type of accommodations provided to mentally ill suspects through mental health crisis response programs nationwide. And, in fact, as the respondent conceded, San Francisco had a crisis intervention program in place and properly trained its officers. *See Sheehan,* 743 F.3d at 1216-17.

The success of mental health crisis intervention models, however, rests on more than just training programs for officers. A successful program requires crisis response sites equipped to respond to psychiatric, substance abuse and medical emergencies; police must also secure no refusal policies and streamlined emergency intake. Henry J. Steadman et al., *A Specialized Crisis Response Site as a Core Element of Police-Based Diversion Programs*, 52(2) PSYCHIATRIC SERVICES 219 (2001).

So, even if a municipality has instituted an intensive training program, individual officers responding to calls in rural or disadvantaged communities with scant mental health resources may be unable to fully implement their training. A study of the Chicago CIT program found that CIT officers in districts with dense mental health

facilities resolved more encounters through referrals or without taking action compared to non-CIT officers, while CIT officers responding to calls in low-resource districts resolved disputes in the same manner as non-CIT officers. Amy C. Watson et al., *CIT in Context: The Impact of Mental Health Resource Availability and District Saturation on Call Dispositions.* 34(4) INT'L J. L. PSYCHIATRY 287 (2011).[5]

The infrastructure of a full-scale intervention program is simply infeasible for rural communities, where mental health facilities are remote, officers respond to calls alone, and backup may be dozens of miles away. According to the Bureau of Justice Statistics' latest census of law enforcement agencies almost half of the police agencies in this country have fewer than 10 officers and over 70% have fewer than 25 officers.[6] These smaller departments do not have the resources of major cities, nor the capability to bring psychologists to help in making arrests.

In light of the disparities between the resources available in various localities, determination of what the appropriate mental health crisis intervention

---

[5] These findings held true even after controls for the level of the individual's resistance, suggesting that CIT training is similarly likely to fail officers in high pressure, violent encounters in low-resource areas. *Id.*

[6] Census of State and Local Law Enforcement Agencies 2008, Bureau of Justice Statistics, http://www.bjs.gov/index.cfm?ty=pbdetail&iid=2216 (last visited 6/24/2014).

model might be is a complicated one depending on multiple factors. An ADA analysis at the policy and training level would support the assessment of the program selected by the agency in light of the overall resources available to the agency, and, under *Olmstead*, it would offer the agency discretion as to its policies in implementing that program. However, imposing the ADA analysis on the moment of arrest would both ignore the contextual factors that shape outcomes of mental health crisis intervention and place the burden of achieving the benefits of a community-wide program on a single officer's decisions based on incomplete information and made under exigent circumstances.

B. Application of the ADA in the Arrest Context is Inconsistent with the Discretion Traditionally Afforded Law Enforcement Officers.

Even the most sophisticated training and mental health partnership model cannot eradicate dangerous confrontations with mentally ill individuals, and in those situations, once officers have been properly trained, the policies underlying the broad discretion this Court has given law enforcement officers in the arrest context still apply. An analysis of officers' actions on the street, as opposed to at the policy and training level, would hold officers to impossible standards in emergency situations, in contradiction to the discretion afforded them under the Court's Fourth Amendment jurisprudence.

Here, when Officers Holder and Reynolds attempted to take Ms. Sheehan into custody, they implemented recommended practices by attempting to subdue Ms. Sheehan with nonlethal force as she approached with the knife, to no avail. *Sheehan*, 743 F.3d at 1219-20. Officers Holder and Reynolds were relying on one of the most sophisticated and successful mental health crisis models in the nation, but their training could not prevent the violent encounter that ensued. If San Francisco's response is inadequate to meet the demands of the ADA, such a standard would present an impossible mandate for rural municipalities contending with fewer resources, sparse mental health facilities, and thinly staffed forces.

The volatile circumstances surrounding the arrest of a violent, armed individual defy the elements of ADA analysis, standing in sharp contrast to cases involving law enforcement encounters that courts have found require accommodations under the ADA. For example, courts have applied the ADA to the detainment and interrogation of individuals with hearing impairments to require predictable, standardized accommodations, such as the use of a qualified interpreter or an assistive communication device. *See, e.g., Bahl v. Cnty. of Ramsey*, 695 F.3d 778 (8th Cir. 2012). The requirement for a sign interpreter, however, is distinct from providing a "comfort zone" to mentally ill individuals who pose a threat to public safety because the accommodations that will resolve an accessibility problem for a hearing-impaired individual are predictable and can

be implemented by the law enforcement agency as an entity.

In contrast, when an officer faces an encounter with a violent, armed mentally ill individual, it is not clear, even in hindsight, which accommodations would have been successful. In fact, it may not always be clear to the officers whether the individual is even suffering from mental illness as opposed to the effects of drugs or alcohol. Similarly, it may be impossible for the officer to ascertain whether the individual has been taking medications to treat their condition, with this critical information often absent from a bench warrant or dispatch. Liz Navratil and Paula Reed Ward, *Mental Illness in Crime Suspects Gives Police Special Problems.* PITTSBURGH POST-GAZETTE, February 7, 2014, at A-1. Such uncertainties make it impossible to determine whether accommodations were required in the situation and what "reasonable accommodations" an officer should have offered.

Instead, the apprehension of an armed mentally ill individual is the exact embodiment of the "tense, uncertain, and rapidly evolving" situation in which officers have traditionally been afforded discretion in the civil rights arena. *Graham*, 490 U.S. at 397. Officers must rely on instinct and training to assess an individual's risk of harm to themselves or the public based on factors such as statements made by the individual, the amount of self-control displayed by the individual, and the volatility of the environment. *Id.*

It is in the context of confrontations with the mentally ill that the need for discretion in handling the situation is at its height. If officers are forced to make complex legal calculations assessing the reasonableness of each individual accommodation based on a multitude of factors, rather than simply relying on their training, hesitation and doubt will lead to more officer and civilian injuries and fatalities.

Courts often order mental evaluations of defendants to determine if the person suffers from a mental disability. These evaluations involve clinical analysis in the calm comfort of a quiet setting. The Ninth Circuit would require police officers to equally calmly assess a person's mental health on the spot, at a time when their lives are being threatened and when the public is at risk. This is inconsistent with the policies undergirding this Court's analysis of officers' conduct in arrest settings – allowing maximum discretion in order to facilitate decisive action. The question of whether a law enforcement agency has properly accommodated mentally ill individuals under the ADA should be analyzed with respect to the department's policies and training only; with respect to specific arrests of mentally ill individuals, the broad discretion afforded to individual law enforcement officers under § 1983 in arrest settings should remain in place.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

SARAH M. SHALF
Counsel of Record
EMORY LAW SCHOOL
SUPREME COURT
ADVOCACY PROJECT
1301 Clifton Road
Atlanta, GA 30322
(404) 712-4652
sarah.shalf@emory.edu

CHARLES W.
THOMPSON, JR.
Executive Director,
General Counsel
INTERNATIONAL
MUNICIPAL LAWYERS
ASSOCIATION, INC.
7910 Woodmont Ave.,
Suite 1440
Bethesda, MD 20814

June 25, 2014

JOINT APPENDIX

No. 13-1412

FILED
JAN - 9 2015
OFFICE OF THE CLERK

In The Supreme Court of the United States

CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, *et al.*,

Petitioners,

v.

TERESA SHEEHAN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX VOLUME 1

SAN FRANCISCO CITY ATTORNEY'S OFFICE
DENNIS J. HERRERA
City Attorney
CHRISTINE VAN AKEN
Chief of Appellate Litigation
BLAKE P. LOEBS
PETER J. KEITH*
Deputy City Attorneys
1390 Market Street, 7th Floor
San Francisco, CA 94102
(415) 554-3908
peter.keith@sfgov.org

Counsel for Petitioners

* *Counsel of Record*

LEONARD J. FELDMAN*
PETERSON WAMPOLD ROSATO LUNA KNOPP
1501 4th Avenue
Suite 2800
Seattle, WA 98101
(206) 624-6800
feldman@pwrlk.com

Counsel for Respondent

* *Counsel of Record*

[Additional Counsel For Respondent On Inside Cover]

Petition For Certiorari Filed May 22, 2014
Certiorari Granted November 25, 2014

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

Library of Congress
Law Library

JILL BOWMAN
STOEL RIVES LLP
600 University Street
Suite 3600
Seattle, WA 98101
(206) 624-0900
jdbowman@stoel.com

BEN NISENBAUM
LAW OFFICES OF JOHN L. BURRIS
7677 Oakport Street
Suite 1120
Oakland, CA 94621
(510) 839-5200
bnisenbaum@johnburrislaw.com

Counsel for Respondent

TABLE OF CONTENTS

Page

Volume 1

Relevant Docket Entries for the United States District Court for the Northern District of California, No. C09-03889 CRB 1

Relevant Docket Entries for the United States Court of Appeals for the Ninth Circuit, No. 11-16401 9

Interview of Officer Kathrine Holder, SFPD Homicide Division (Aug. 8, 2008) (excerpts) [filed at Dist. Ct. Dkt. No. 43-4][1] 11

Testimony of Heath Hodge and Sergeant Kimberly Reynolds, Reporter's Transcript, Preliminary Hearing, *People of the State of California v. Teresa Sheehan*, Superior Court of California, County of San Francisco, Court No. 2381035 (Sept. 2, 2008) (excerpts) [filed at Dist. Ct. Dkt. No. 48-9] 18

[1] The joint appendix materials are arranged chronologically by the date of each witness's testimony or declaration, rather than the docket filing date. For several witnesses, different excerpts from the same witnesses' testimony were filed on different dates across the district court docket. Therefore, for ease of reference and to avoid duplication, this joint appendix consolidates the relevant excerpts for each witness in one location.

TABLE OF CONTENTS – Continued

Page

Testimony of Officer Kathrine Holder, Reporter's Transcript of Preliminary Hearing, *People of the State of California v. Teresa Sheehan*, Superior Court of California, County of San Francisco, Court No. 2381035 (Sept. 3, 2008) (excerpts) [filed at Dist. Ct. Dkt. No. 48-10] 57

Testimony of Officer Kathrine Holder and Officer Constantine Zachos, Reporter's Transcript of Trial, *People of the State of California v. Teresa Sheehan*, Superior Court of California, County of San Francisco, Court No. 2381035, SCN 206458 (Nov. 20 & 24, 2008) (excerpts) [filed at Dist. Ct. Dkt. No. 51] 73

Testimony of Heath Hodge, Reporter's Transcript of Videotaped Deposition, *Sheehan v. City and County of San Francisco et al.*, N. D. Cal. No. C09-03889 CRB (Oct. 14, 2010) (excerpts) [filed at Dist. Ct. Dkt. Nos. 45-1 & 48-3] 83

Testimony of Officer E. R. Balinton, Reporter's Transcript of Deposition, *Sheehan v. City and County of San Francisco et al.*, N. D. Cal. No. C09-03889 CRB (Oct. 27, 2010) (excerpts) [filed at Dist. Ct. Dkt. No. 48-7] 120

Testimony of Officer Constantine Zachos, Reporter's Transcript of Deposition, *Sheehan v. City and County of San Francisco et al.*, N. D. Cal. No. C09-03889 CRB (Oct. 29, 2010 a.m.) (excerpts) [filed at Dist. Ct. Dkt. No. 45-6] 124

TABLE OF CONTENTS – Continued

Page

Testimony of Officer Constantine Zachos, Reporter's Transcript of Deposition, *Sheehan v. City and County of San Francisco et al.*, N. D. Cal. No. C09-03889 CRB (Oct. 29, 2010 p.m.) (excerpts) [filed at Dist. Ct. Dkt. No. 48-5] 128

Testimony of Officer Kathrine Holder, Reporter's Transcript of Deposition, *Sheehan v. City and County of San Francisco et al.*, N. D. Cal. No. C09-03889 CRB (Nov. 2, 2010) (excerpts) [filed at Dist. Ct. Dkt. Nos. 45-2 & 48-2] 155

Testimony of Sergeant Kimberly Reynolds, Reporter's Transcript of Deposition, *Sheehan v. City and County of San Francisco et al.*, N. D. Cal. No. C09-03889 CRB (Nov. 9, 2010) (excerpts) [filed at Dist. Ct. Dkt. Nos. 45-3 & 48-4] 200

Testimony of Teresa Sheehan, Reporter's Transcript of Videotaped Deposition, *Sheehan v. City and County of San Francisco et al.*, N. D. Cal. No. C09-03889 CRB (Nov. 15, 2010) (excerpts) [filed at Dist. Ct. Dkt. Nos. 45-7 & 48-6] 267

Examination Report of James L. Norris (Dec. 10, 2010) [filed at Dist. Ct. Dkt. No. 45-5] 291

Preliminary Expert Report of Lou Reiter (Dec. 13, 2010) [filed at Dist. Ct. Dkt. No. 45-8] 301

TABLE OF CONTENTS – Continued

Page

Testimony of Lou Reiter, Reporter's Transcript of Deposition, *Sheehan v. City and County of San Francisco et al.*, N. D. Cal. No. C09-03889 CRB (Jan. 7, 2011) (excerpts) [filed at Dist. Ct. Dkt. No. 48-11] 359

Motion for Summary Judgment, Reporter's Transcript of Hearing, *Sheehan v. City and County of San Francisco et al.*, N. D. Cal. No. C09-03889 CRB (Apr. 8, 2011) [filed at Dist. Ct. Dkt. No. 68] 369

The following opinions and orders have been omitted in printing this Joint Appendix because they appear on the following pages in the appendix to the Petition for a Writ of Certiorari:

Opinion and Order of the District Court for the Northern District of California, May 6, 2011 .....Pet. App. 55

Opinion of the Court of Appeals for the Ninth Circuit, February 21, 2014 .....Pet. App. 1

Volume 2 (Exhibits)

Exhibit 103 – Application for 72-Hour Detention [from Testimony of Heath Hodge, Reporter's Transcript of Videotaped Deposition, *Sheehan v. City and County of San Francisco et al.*, N. D. Cal. No. C09-03889 CRB (Oct. 14, 2010), filed at Dist. Ct. Dkt. No. 48-3] 397

TABLE OF CONTENTS – Continued

Page

Exhibit 104 – Photograph of Knife
[from Testimony of Heath Hodge, Reporter's Transcript of Videotaped Deposition, *Sheehan v. City and County of San Francisco et al.*, N. D. Cal. No. C09-03889 CRB (Oct. 14, 2010), filed at Dist. Ct. Dkt. No. 48-3] 399

Exhibit 121 – Photograph of Outside Door
[from Testimony of Officer Constantine Zachos, Reporter's Transcript of Deposition, *Sheehan v. City and County of San Francisco et al.*, N. D. Cal. No. C09-03889 CRB (Oct. 29, 2010 p.m.), filed at Dist. Ct. Dkt. No. 48-5] 400

Exhibit 122 – Photograph of Stairway
[from Testimony of Officer Constantine Zachos, Reporter's Transcript of Deposition, *Sheehan v. City and County of San Francisco et al.*, N. D. Cal. No. C09-03889 CRB (Oct. 29, 2010 p.m.), filed at Dist. Ct. Dkt. No. 48-5].....401

Exhibit 124 – Photograph of Scene
[from Testimony of Officer Constantine Zachos, Reporter's Transcript of Deposition, *Sheehan v. City and County of San Francisco et al.*, N. D. Cal. No. C09-03889 CRB (Oct. 29, 2010 p.m.), filed at Dist. Ct. Dkt. No. 48-5].....402

Exhibit 125 – Photograph of Scene
[from Testimony of Officer Constantine Zachos, Reporter's Transcript of Deposition, *Sheehan v. City and County of San Francisco et al.*, N. D. Cal. No. C09-03889 CRB (Oct. 29, 2010 p.m.) [filed at Dist. Ct. Dkt. No. 48-5] 403

TABLE OF CONTENTS – Continued

Page

Exhibit 128 – Photograph of Knife
[from Testimony of Officer Constantine Zachos, Reporter's Transcript of Deposition, *Sheehan v. City and County of San Francisco et al.*, N. D. Cal. No. C09-03889 CRB (Oct. 29, 2010 p.m.), filed at Dist. Ct. Dkt. No. 48-5].....404

Exhibit 129 – Photograph of Knife With Measuring Device
[from Testimony of Officer Constantine Zachos, Reporter's Transcript of Deposition, *Sheehan v. City and County of San Francisco et al.*, N. D. Cal. No. C09-03889 CRB (Oct. 29, 2010 p.m.), filed at Dist. Ct. Dkt. No. 48-5] 405

Exhibit 140 – Diagram of Scene
[from Testimony of Officer Constantine Zachos, Reporter's Transcript of Deposition, *Sheehan v. City and County of San Francisco et al.*, N. D. Cal. No. C09-03889 CRB (Oct. 29, 2010 p.m.), filed at Dist. Ct. Dkt. No. 48-5].....406

Exhibit A – Computer Automated Dispatch Event History Detail
[from Testimony of Officer Kathrine Holder, Reporter's Transcript of Deposition, *Sheehan v. City and County of San Francisco et al.*, N. D. Cal. No. C09-03889 CRB (Nov. 2, 2010), filed at Dist. Ct. Dkt. 48-2] 407

TABLE OF CONTENTS – Continued

Page

Exhibit K – Photograph of Scene
[from Testimony of Officer E. R. Balinton, Reporter's Transcript of Deposition, *Sheehan v. City and County of San Francisco et al.*, N. D. Cal. No. C09-03889 CRB (Oct. 27, 2010), filed at Dist. Ct. Dkt. No. 48-7] 409

Exhibit (no number) – Diagram of Scene
[from Examination Report of James L. Norris (Dec. 10, 2010), filed at Dist. Ct. Dkt. 45-5].....410

RELEVANT DOCKET ENTRIES FOR THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Date Filed	#	Docket Text
08/25/2009	1	COMPLAINT: summons issued against City and County of San Francisco, Heather Fong, Katherine [sic] Holder, Kimberly Reynolds (Filing fee $ 350, receipt number 44611004019). Filed by Teresa Sheehan. (Attachments: # 1 Civil Cover Sheet, # 2 Summons) (slh, COURT STAFF) (Filed on 8/25/2009) (Entered: 08/27/2009)
09/22/2009	3	ANSWER to Complaint with Jury Demand by City and County of San Francisco, Heather Fong. Katherine [sic] Holder, Kimberly Reynolds. (Loebs, Blake) (Filed on 9/22/2009) (Entered: 09/22/2009)
01/20/2011	37	MOTION for Summary Judgment DEFENDANTS NOTICE OF MOTION FOR SUMMARY JUDGMENT OR ALTERNATIVELY, PARTIAL SUMMARY JUDGMENT filed by City and County of San Francisco, Heather Fong, Katherine [sic] Holder, Kimberly Reynolds. Motion Hearing set for 2/25/2011 10:00 AM in Courtroom 8, 19th Floor, San Francisco before Hon. Charles R. Breyer. (Keith, Peter) (Filed on 1/20/2011) (Entered: 01/20/2011)

01/20/2011	39	Declaration of PETER J. KEITH in Support of 38 MOTION for Summary Judgment, 37 MOTION for Summary Judgment *DEFENDANTS NOTICE OF MOTION FOR SUMMARY JUDGMENT OR ALTERNATIVELY, PARTIAL SUMMARY JUDGMENT* filed by City and County of San Francisco, Heather Fong, Katherine [sic] Holder, Kimberly Reynolds. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C) (Related document(s) 38, 37) (Keith, Peter) (Filed on 1/20/2011) (Entered: 01 /20/2011)
01/21/2011	40	Declaration of BLAKE P. LOEBS in Support of 37 MOTION for Summary Judgment *DEFENDANTS NOTICE OF MOTION FOR SUMMARY JUDGMENT OR ALTERNATIVELY, PARTIAL SUMMARY JUDGMENT* filed by City and County of San Francisco, Heather Fong, Katherine [sic] Holder, Kimberly Reynolds. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D1, # 5 Exhibit D2, # 6 Exhibit E1, # 7 Exhibit E2, # 8 Exhibit F, # 9 Exhibit G, # 10 Exhibit H) (Related document(s) 38, 37) (Loebs, Blake) (Filed on 1/21/2011) Modified on 1/24/2011 (mcl, COURT STAFF). (Entered: 01/21/2011)

01/21/2011 41 Brief *DEFENDANTS MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF 37 MOTION FOR SUMMARY JUDGMENT [AMENDED]* filed by City and County of San Francisco, Heather Fong, Katherine [sic] Holder, Kimberly Reynolds. (Keith, Peter) (Filed on 1/21/2011) Modified on 1/24/2011 (mcl, COURT STAFF). (Entered: 01/21/2011)

02/04/2011 42 Memorandum in Opposition re 37 MOTION for Summary Judgment *DEFENDANTS NOTICE OF MOTION FOR SUMMARY JUDGMENT OR ALTERNATIVELY, PARTIAL SUMMARY JUDGMENT* filed by Teresa Sheehan. (Attachments: # 1 Proposed Order Proposed Order) (Nisenbaum, Benjamin) (Filed on 2/4/2011) (Entered: 02/04/2011)

02/04/2011 43 Declaration of Benjamin Nisenbaum in Support of 42 Memorandum in Opposition, filed by Teresa Sheehan. (Attachments: # 1 Exhibit A: Deposition Testimony of Heath Hodge, # 2 Exhibit B: Deposition Testimony of Kathrine Holder, # 3 Exhibit C: Deposition Testimony of Kimberly Reynolds, *** # 4 **Exhibit D: Interview of Kathrine Holder, # 5 Exhibit F: Deposistion** [sic] **Testimony of Constatine** [sic] **Zachos FILED IN ERROR. DOCUMENT LOCKED. PLEASE SEE DOCKET**

		# 45 *** , # 6 Exhibit G: Deposition Testimony of Teresa Sheehan, # 7 Exhibit H: Preliminary Expert Report Lou Reiter) (Related document(s) 42) (Nisenbaum, Benjamin) (Filed on 2/4/2011) Modified on 2/8/2011 (ewn, COURT STAFF). (Entered: 02/04/2011)
02/07/2011	44	Administrative Motion to File Under Seal *and [Proposed] Order* filed by Teresa Sheehan. (Attachments: # 1 Stipulation to File Document Under Seal) (Nisenbaum, Benjamin) (Filed on 2/7/2011) (Entered: 02/07/2011)
02/07/2011	45	Declaration of Benjamin Nisenbaum in Support of 42 Memorandum in Opposition, *Amended Declaration of Benjamin Nisenbaum in Support of Memorandum In Opposition to Defendants' Motion for Summary Judgment* filed by Teresa Sheehan. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H) (Related document(s) 42) (Nisenbaum, Benjamin) (Filed on 2/7/2011) (Entered: 02/07/2011)
02/08/2011	46	ORDER by Judge Charles R. Breyer granting 44 Administrative Motion to File Under Seal (be, COURT STAFF) (Filed on 2/8/2011) (Entered: 02/08/2011)

02/11/2011	47	Reply Memorandum re 37 MOTION for Summary Judgment *DEFENDANTS NOTICE OF MOTION FOR SUMMARY JUDGMENT OR ALTERNATIVELY, PARTIAL SUMMARY JUDGMENT* filed by City and County of San Francisco, Heather Fong, Katherine [sic] Holder, Kimberly Reynolds. (Loebs, Blake) (Filed on 2/11/2011) (Entered: 02/11/2011)
02/11/2011	48	Declaration of BLAKE P. LOEBS in Support of 47 Reply Memorandum, filed by City and County of San Francisco, Heather Fong, Katherine [sic] Holder, Kimberly Reynolds. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit G, # 7 Exhibit H, # 8 Exhibit I, # 9 Exhibit J, # 10 Exhibit K, # 11 Exhibit L) (Related document(s) 47) (Loebs, Blake) (Filed on 2/11/2011) (Entered: 02/11/2011)
02/11/2011	49	OBJECTIONS to re 42 Memorandum in Opposition, *DEFENDANTS OBJECTION TO AND MOTION TO STRIKE EVIDENCE OFFERED BY PLAINTIFFS IN SUPPORT OF OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT* by City and County of San Francisco, Heather Fong, Katherine [sic] Holder, Kimberly Reynolds. (Loebs, Blake) (Filed on 2/11/2011) (Entered: 02/11/2011)

02/11/2011	50	Proposed Order re 37 MOTION for Summary Judgment *DEFENDANTS NOTICE OF MOTION FOR SUMMARY JUDGMENT OR ALTERNATIVELY, PARTIAL SUMMARY JUDGMENT [PROPOSED] ORDER GRANTING DEFENDANTS MOTION FOR SUMMARY JUDGMENT* by City and County of San Francisco, Heather Fong, Katherine [sic] Holder, Kimberly Reynolds. (Loebs, Blake) (Filed on 2/11/2011) (Entered: 02/12/2011)
02/14/2011	51	EXHIBITS re 48 Declaration in Support, *EXHIBIT F TO THE DECLARATION OF BLAKE P. LOEBS IN SUPPORT OF REPLY FOR MOTION FOR SUMMARY JUDGMENT (Inadvertently Omitted)* filed by City and County of San Francisco, Heather Fong, Katherine [sic] Holder, Kimberly Reynolds. (Related document(s) 48) (Loebs, Blake) (Filed on 2/14/2011) (Entered: 02/14/2011)
02/16/2011	52	OBJECTIONS to re 49 Objection, *PLAINTIFFS OPPOSITION TO DEFENDANTS OBJECTION TO AND MOTION TO STRIKE EVIDENCE OFFERED BY PLAINTIFF IN SUPPORT OF OPPOSITION TO DEFENDANTS MOTION FOR SUMMARY JUDGMENT* by Teresa Sheehan. (Nisenbaum, Benjamin) (Filed on 2/16/2011) (Entered: 02/16/2011)

02/17/2011	54	NOTICE by City and County of San Francisco, Heather Fong, Katherine [sic] Holder, Kimberly Reynolds re 47 Reply Memorandum, *DEFENDANTS NOTICE OF SUBMITTING AMENDED REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR ALTERNATIVELY PARTIAL SUMMARY JUDGMENT* (Loebs, Blake) (Filed on 2/17/2011) (Entered: 02/17/2011)
02/17/2011	55	REPLY (re 37 MOTION for Summary Judgment *DEFENDANTS NOTICE OF MOTION FOR SUMMARY JUDGMENT OR ALTERNATIVELY, PARTIAL SUMMARY JUDGMENT) DEFENDANTS AMENDED REPLY BRIEF (TO CORRECT MARGIN ERROR) IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR ALTERNATIVELY PARTIAL SUMMARY JUDGMENT* filed by City and County of San Francisco, Heather Fong, Katherine [sic] Holder, Kimberly Reynolds. (Loebs, Blake) (Filed on 2/17/2011) (Entered: 02/17/2011)
04/08/2011	60	Minute Entry: Motion Hearing held on 4/8/2011 before Charles R. Breyer (Date Filed: 4/8/2011) re 37 MOTION for Summary Judgment filed by Katherine [sic] Holder, City and County of San Francisco, Kimberly Reynolds, Heather Fong. (Court Reporter Belle

		Ball.) (beS, COURT STAFF) (Date Filed: 4/8/2011) (Entered: 04/08/2011)
05/06/2011	61	ORDER by Judge Charles R. Breyer granting 37 Motion for Summary Judgment. (Attachments: # 1 Photographs) (crblc1, COURT STAFF) (Filed on 5/6/2011) Entered: 05/06/2011)
05/09/2011	62	JUDGMENT. Signed by Judge Charles R. Breyer on 5/9/2011. (crblc1, COURT STAFF) (Filed on 5/9/2011) (Entered: 05/09/2011)
06/02/2011	64	NOTICE OF APPEAL as to 61 Order on Motion for Summary Judgment, 62 Judgment by Teresa Sheehan. Filing fee $ 455, Receipt # 34611060505. (mcl, COURT STAFF) (Filed on 6/2/2011) (Entered: 06/02/2011)

RELEVANT DOCKET ENTRIES FOR THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

06/03/2011	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes. The 14 pg, 588.45 KB schedule is set as follows: Mediation Questionnaire due on 06/10/2011. Transcript ordered by 07/05/2011. Transcript due 08/01/2011. Appellant Teresa Sheehan opening brief due 09/12/2011. Appellee City and County of San Francisco, Appellee Heather Fong, Appellee Katherine [sic] Holder and Appellee Kimberly Reynolds answering brief due 10/12/2011. Appellant's optional reply brief is due 14 days after service of the answering brief. [7773412] (GR)
10/24/2011	7	Submitted (ECF) Opening brief for review. Submitted by Appellant Teresa Sheehan. Date of service: 10/24/2011. [7939659] – [COURT UPDATE: Replaced PDF of brief (to include statement of related cases). Resent NDA. 10/26/2011 by TW] (BN)
01/24/2012	15	Submitted (ECF) Answering brief for review. Submitted by Appellees City and County of San Francisco, Heather Fong, Katherine [sic] Holder and Kimberly Reynolds. Date of service: 01/24/2012. [8043424] (PJK)

03/06/2012	21	Submitted (ECF) Reply brief for review. Submitted by Appellant Teresa Sheehan. Date of service: 03/06/2012. [8093311] – [COURT UPDATE: Replaced PDF of brief (corrected footnotes). Resent NDA. 03/08/2012 by TW] (BN)
01/16/2013	27	ARGUED AND SUBMITTED TO JOHN T. NOONAN, SUSAN P. GRABER and RAYMOND C. FISHER. [8477034] (LKK)
02/21/2014	33	FILED OPINION (JOHN T. NOONAN, SUSAN P. GRABER and RAYMOND C. FISHER) AFFIRMED IN PART; VACATED IN PART; REMANDED. Each party shall bear its own costs on appeal. Judge: JTN, Judge: SPG Concurring & dissenting, Judge: RCF Authoring. FILED AND ENTERED JUDGMENT. [8986719] (PH)
03/11/2014	38	Filed order (RAYMOND C. FISHER) Appellees motion for stay of the issuance of the mandate pending application for writ of certiorari, filed March 7, 2014, is GRANTED. Fed. R. App. P. 41(b). Therefore, it is ordered that the mandate is stayed pending the filing of the petition for writ of certiorari in the Supreme Court. The stay shall continue until final disposition by the Supreme Court. [9010882] (BJB)

People v. Teresa Sheehan

Court No.: 2381035

Interview of Officer Kathrine Holder

Q: Inspector Karen Lynch, Star No. 859

Q1: Inspector John Cagney, Star No. 341

Q2: Assistant District Attorney Marshall Khine

Q3: District Attorney Investigator Matt Irvine

Q4: Sergeant Mike Nevin, Management Control

Q5: Attorney Peter A. Furst, Police Officers Association

Q6: Steve Johnson, Police Officers Association

A: Officer Kathrine Holder, Star No. 1619

Q: This is Inspector Lynch from the San Francisco Police Department. Today's date is August 7th, 2008. It's now 1555 hours. We're at 850 Bryant, at the Hall of Justice, in Room 561, the Homicide Detail. Present with me is Inspector John Cagney, Star No.?

Q1: 341.

Q: Also present is?

Q2: Marshall Khine, assistant district attorney, San Francisco District Attorney's Office.

Q3: Matt Irvine, investigator with the District Attorney's Office.

Q4: Sergeant Mike Nevin, Management Control.

Q5: Peter A. Furst, attorney, for the Police Officers Association, on behalf of the officer.

Q6: Steve Johnson, Police Association.

Q: Okay. And we're speaking with Officer – would you spell your last name, please?

A: H-o-l-d-e-r.

Q: And your first name?

A: Kathrine.

* * *

the police," which understand we're in full uniform. We had already identified ourselves several times.

Um, the sergeant tried to get the door open, but she's small. So I suggested – I had my pepper spray out and I shook it up to make sure it was activated and which she had said, "Make sure, Kathrine, make sure you have your pepper spray out." So I had it out. Um, I couldn't use my baton because there was no swinging – to set up this hallway, it's an older house. It's very narrow, very narrow hallway. So it's probably a little bit more narrow than this table on my end right here. And, um, I almost wish I could draw you a diagram. As you walk down, her door is right at the end of it, and then there is another door right next to it, and there's – I think it's either a door or a closet or another wall. I'm not sure what's right here. So it makes a little tiny triangle right there in the corner.

So she was in the front of me at the door trying to open it. She tried to push it open with her shoulder a couple of times, and I finally said, "Hey, Serg.," you know, "I'm a little bigger than you so why don't I try." So she said, "Okay."

I gave her the pepper spray. We both had our guns out, which we had taken out when we saw her grab the knife. Um, so I hit it a couple times with my shoulder – no, with my foot. I hit it once with my foot and it didn't do anything. So I hit it a couple of times with my shoulder and it started to budge. So then I think it was the third time I got it open and this whole time, you know, she was doing most of the talking 'cause I'm hitting the door, and she kept repeating, you know, "We want to talk to you. Open the door." You know, "Put down the knife." Um, so I got the door open and she had – I don't know if I had kind of thrown her back a little bit or what, but she came from, um – from me to him – I'm sorry, I don't remember your name.

Q3: It's okay. Matt.

A: Matt. She's about to him with the door kind of between us, and but it was open and she said again "I'll kill you" and she started coming towards us with the knife. We attempted to kind of retreat. We – she – I couldn't go down the hallway 'cause she was behind me and then she would have her weapon pointed at my back, and I – I'm a little bit bigger than her. I – we – I'd collapse [inaudible] on the floor, I'm sure. Um, so she retreated kind of back in the hallway as she's walking forward. So I took a step backwards and we're both yelling at her, "Put down the knife." And she kept walking really fast and she just brought her arm up like this when she got to the door and she was probably closer than you are to me right now. Um, brought her hand out like this, and I fired and the sergeant fired.

Um, I don't know exactly how many rounds. Um, she fell to the floor and she kept – the sergeant was kind of standing by her head and she went like this with the knife again and it seemed like she was planning on going towards her foot a little bit and the sergeant shot again, and, um, I put it out on the air – I had put it out. I don't remember at what point I put it out that she was a barricaded suspect with a knife. Well, she wasn't barricaded, I guess, really, but anyway, with the knife and, um, I called Code 33 for additional units. And, um, so when I shot, I went over and said "Shots fired" and then they came.

Q: And just for the tape, um, you're showing that she had her right hand up over her head sort of or next to her head?

A: I don't know if I did that 'cause I'm right-handed.

Q: Hmm.

A: I think she actually had it – in my memory she had it in her left hand –

Q: Mmm-hmm, okay.

A: – when she was standing, but when she was on the floor, she had it in her right hand 'cause it was her bottom arm.

Q: Okay. But it was –

A: So I don't –

Q: She was holding it up in the air?

A: Yeah, she was, like in a –

Q: Like up over her in a –

Q1: A striking position, would you characterize –

A: In a striking – like a downward striking –

Q: Okay.

A: – type of.

Q1: That's how you'd characterize it?

A: Yes, very much so.

Q2: And the blade was pointing in your direction?

A: Yes, it was.

Q2: And the distances that you were referencing, um, she was initially a distance of about four to six feet and closed the distance to about three to four feet from you?

A: Yeah.

Q: And you fired the first shot or Kim did?

A: I don't know for sure.

Q: Okay. And how many shots do you think you fired?

A: I think I fired two to three.

Q: And do you know if Kim fired any shots?

A: I believe she shot two to three. I know she fired. I just don't know how many.

Q: And did the – did the shooting stop the suspect?

A: Yeah. She fell to the floor, but then she started going like this. So that's when the sergeant shot her again and then she stopped.

Q2: And when you say goes "like this," you're referencing –

A: I'm sorry. Yeah, it was, um –

Q: What [inaudible]?

A: She had the knife – I don't know how all this – she had it up like this. Um, the knife was still – I don't remember which direction the knife was pointing anymore. I'm sorry. And she went like – she was laying on the ground on her right side and she went like this and the sergeant – uh, "this" being in a raising her hand over her head with the knife in it still in a – what would be a striking position. In a – she went towards the sergeant's foot above her head, um, when Sergeant Reynolds fired again.

Q: And what was going through your mind while all this was happening?

A: That you need a lot of distance between you and somebody with a knife in order to not be stabbed; that knives go through Kevlar; and that if I didn't stop her from stabbing me or stabbing my partner, we were going to die or get seriously injured.

Q1: So you were afraid?

A: Yes.

Q1: And you were afraid for your partner?

A: Yes.

Q: Have you ever, um, had an encounter with this woman before?

A: Not that I recall, no.

Q: Okay.

Q1: I might have missed something. Did you employ your pepper spray at some point during this incident?

A: I did. I did. I had brought it out and I had shaken it and – when she was hitting the wall and then I had given it to her. I apologize, yeah. I had backed up when the door opened again and she had the knife out before the last incident. Sergeant Reynolds sprayed her. She had a good shot right across the eyes and it didn't seem to affect her at all.

Q1: So let me get this straight. Your pepper spray ended up with Sergeant Reynolds?

A: Yes.

SUPERIOR COURT OF THE
STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

BEFORE THE HONORABLE RAYMOND J. ARATA

DEPARTMENT NUMBER 13

---000---

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. TERESA SHEEHAN, Defendant.	SCN Court No. 2381035 PRELIMINARY HEARING VOLUME I

Reporter's Transcript of Proceedings

Tuesday, September 2, 2008

APPEARANCES OF COUNSEL:

For Plaintiff:

BY: **DAVID MITCHELL, Assistant District Attorney**

For Defendant:

BY: **KLEIGH HATHAWAY**, Deputy Public Defender

Reported By: Tamara Willat, CSR No. 4609

* * *

[3] HEATH HODGE,

called as a witness by the People, was first duly sworn and testified as follows:

* * *

BY MR. MITCHELL: Q. Would you please tell us what your occupation is?

A. I am the program director at the Conner [sic] House, a cooperative apartment program. I am a social worker.

Q. Can you tell us what the Conner [sic] House cooperative program is?

A. The cooperative program is a supportive program for people with chronic mental illness, substance abuse and who are low income. We have 22 apartments in San Francisco, and we house 2 [4] to 6 residents per apartment. We provide supportive services in the form of weekly house meetings, ongoing case management, assessment and linkage to resources in the community.

Q. Are there any rules that people must meet to be a participant in this program?

A. People need to be referred through the City and County of San Francisco. They need to have an Axis 1 diagnosis. They have to be linked through the City and County of San Francisco and that is the basic requirement for the program. We do an intake process and assess people's level of ability to manage independently. It is an independent living program.

Q. The People [sic] that are in this program – you mention one thing is weekly meetings. Is there any other activities or structure to this program?

A. We ask that people have a 20-hour a week program that they do. However, the only – we have a lease and that is the binding contract that the client sign. In the lease, we request that – or we ask them to comply with certain house rules which are part of the lease, which are just basic house rules. And then, like I said, we ask them to do something 20 hours a week. We encourage them very strongly to have either a vocational program or to do groups or to do some sort of psychiatric care if they need it or if they want to.

Q. What are the house rules?

A. I don't remember all of them off the top of my head. There are basic rules of being able to attend a weekly house meeting. I think is part of the house rules. They need to work with their housemates to pay utilities together. House chores. There is a [5] rule about no violence in the apartment. There is a rule about no illegal substances in the apartments. There are rules about house guests, which is kind of a basic rule about having guests over that the house kind of agrees on the terms of that. To pay your rent on time. Like I said, I don't have them right in front of me.

Q. You mentioned to be eligible for this program someone has to have an Axis 1 diagnosis?

A. Yes.

Q. You also mentioned psychiatric care?

A. Yes.

Q. Who provides that service?

A. All of our clients are referred through the City and County of San Francisco through either city clinics or programs or contract agencies in the City and County of San Francisco. So they are linked to community behavioral services. They have a BIS number, and there is a referral process where they have to go through the city and the city approves them for that level of care. So the co-ops are one level of care.

Q. When someone is placed in-house, do you have access to that house?

A. Yes.

Q. And what type of duty or functions do you have in relationship to a person who is in one of the houses?

A. Me personally?

Q. That is correct.

A. I supervise the five counselors who work at the program. And I go out to the house whenever I am needed to help resolve [6] conflicts when the counselors are having problems. I am the only one at our program, at the co-op who carries a 5150 card. If I am

available, I will go out to assess a client for a 5150 and that is – I will go out to house meetings often.

* * *

[8] MR. MITCHELL: Q. Are you familiar with an incident that took place on August 7, 2008?

A. August 7th, 2008?

Q. Involving Miss Teresa Sheehan.

A. I can't remember all the dates. Are you speaking about the incident that we are here about today?

Q. Yes.

A. Yes.

Q. Do you recognize anyone in court from that incident?

A. Yes.

Q. Could you please identify who you recognize by where they are seated and what they are wearing?

A. The sergeant sitting right next to you, I recognize her; and I recognize Teresa sitting next to Kleigh.

THE COURT: The defendant is identified.

MR. MITCHELL: Q. In this incident, did it take place at 1941 15th Street here in San Francisco?

A. Yes.

Q. What was it that led you to that location on this date?

A. Well, a series of things. To begin with, what led me there was concern about Teresa's well-being. I went out to the co-op on Tuesday before that Thursday. I was out there to see her housemate, and while I was out there, I attempted to check in on [9] Teresa and she did not answer her door. She didn't make any sound behind her door. And I told her through the door that if I didn't see her that I was going to need to come out there and check in on her and that meant if she didn't answer her door, I was going to need to key into her room.

Previous to that, we had not seen her for almost two weeks visibly; the counselor had not seen her at the house meetings. I had not seen her. We had also been getting reports from her housemates that she had been coming and going at weird hours in the night, which is unlike Teresa. We also heard from another housemate she had been wearing the same clothing for several days in a row, which is unlike her.

Aside from that, we knew that she had been off her medications for many months. She last saw her psychiatrist I think in February and had fired her psychiatrist and was refusing all medications. On Wednesday of that week, the day before the incident, on Thursday, I had got a call from a police officer who – it was actually staff got a call from a police officer, I was out sick that day, and said that the police had been summoned to 1941 by Teresa. And when they

came there, she reported people had been in the apartment but they didn't find any evidence of that and none of the other housemates supported that. It was then that the police officers called West Side [sic] Crisis because they found a bottle of medication that had that number on there. They called Westside and were kind of trying to figure out what was going on with Teresa because they felt her mental status was off and they learned that – they spoke with Muna el-Shieb, who is assigned as Teresa's case manager, and Muna had not seen [10] Teresa and had not been able to reach her.

When Teresa had been to see her, she had been somewhat hostile when she did see her. When Muna and I discussed the situation, Muna did not feel – she felt she could not go out and see Teresa. That is the whole story of why I ended up going out there on Thursday to check in on her. There is a little bit more.

* * *

CROSS-EXAMINATION

[16] BY MS. HATHAWAY: Mr. Hodge, Teresa, has she been a resident since 2002?

A. Yes.

Q. And she has an Axis 1 diagnosis?

A. Yes.

Q. What is that?

A. Schizo-affective disorder.

* * *

[17] Q. Prior to – if I have this correct, prior to calling the police, you made sure that the only person in the apartment was Teresa; is that correct?

A. Yes.

* * *

Q. And was it clear to you at that point that Teresa's goal was to get you out of her room?

A. Yes.

Q. And when she – after she slammed the door, did she continue to threaten you or yell at you through the door?

A. No.

Q. And so once the door was closed, she didn't continue to yell at you?

A. No.

Q. Now, and when you were in the room the first time, you did not see a knife?

A. No, I did not.

Q. And she didn't physically come at you in any way?

[18] A. No. Very angry, hostile.

Q. Were you personally afraid of something she may do to you?

A. If I stayed in the room and tried to engage with her, I felt that I would have been – I would have put myself at risk. In that sense, yes. But just leaving the room, I felt – I didn't feel like she was going to come after me.

Q. And after you cleared the – after you asked whoever it was there to leave, you then called the police?

A. I filled out the 5150 form, and then I called the police.

Q. And do you have any idea how long it took for the police to get there?

A. Not that long. Maybe it was – surprisingly fast, because I went to the corner store and got a water and came back, and they were there. I had to actually run back when they pulled up.

Q. And during that time, where were you?

A. I was waiting outside in front of the building on the sidewalk.

Q. You had no reason to believe that Teresa was suicidal in anyway, that is correct?

A. No, I did not. No, no.

Q. Your experience with her is that she is not – she has not been a suicidal threat?

A. No, I have never experienced her to be a suicidal risk.

Q. And so, then, the second interaction you had with Teresa, that is when the police were there; is that right?

A. Yes.

Q. And when the police went up to the apartment, to her room, did you follow them to the door? And what happened?

[19] A. I went to the door and kind of was standing behind them.

Q. And how long did they attempt to talk to Teresa through the door prior to entering her room?

A. I don't think it was very long.

Q. Okay. Less than a minute? Five minutes?

A. Couple of minutes, I think.

Q. And if you recall, what sort of things were they saying?

A. I know they knocked on her door, and I think they said it is the police and "we are here to help you" and – I don't remember.

Q. At that point, did you tell the police – was there any sense of urgency as to something was happening in that room that needed to be stopped or any sense of urgency at that point?

A. I didn't – I didn't tell them anything. I didn't convey any sense of urgency, no.

Q. While you were there standing with the police, did you hear anything at all from the room?

A. I don't think so. I don't think she said anything.

Q. Did the police ever say, "We are going to come into your room, Teresa, open the door"? Anything like that?

A. I think so. I just can't remember.

Q. So after a couple of minutes of trying to talk to her, that is when they opened her door?

A. Yeah. I gave them the key, and they keyed into her room.

Q. And where were you standing when they keyed into her room?

A. I was standing behind them in the hallway.

Q. Like a couple of feet?

A. A couple of feet behind them, yes.

Q. What did you see Teresa do?

[20] A. I saw her jump out of bed and grab a knife from her bed and start waving it around and yelling for them to get out.

* * *

[22] Q. And you said at some point you were asked to let backup in?

A. Yes.

Q. And was it your understanding that backup was actually downstairs?

A. Yes. They were coming towards the apartment building.

Q. Did you hear anything that led you to believe that other police officers had arrived outside?

A. I think I heard sirens.

Q. And who – how were you asked to go downstairs? How did that happen?

A. The sergeant here asked me, "Can you go let the backup in?"

Q. At that point, were you at the top of the stairs?

A. Yes.

Q. And both officers were at the door?

A. Yes.

Q. And the door was closed?

A. I think so.

Q. Okay?

A. Yes.

Q. And did you stay there for a couple of minutes, or did you immediately go down the stairs?

A. I pretty much started to go down the stairs.

Q. Was it one flight of stairs or two?

[23] A. One flight of stairs, yeah.

Q. When did you – I am not sure if you testified to this, did you hear shots fired?

A. Oh, yeah.

Q. Where were you?

A. I think I was halfway down the stairs, three-quarters of the ways down the stairs.

Q. Was this a typical 10-step or 15-step stairwell? What is it?

A. 15 or 20. 1 flight of stairs, a middle floor flat.

Q. If you can estimate, what time passed between you being asked to let the backup in and when you heard shots fired?

A. Not that much time.

Q. Was it the time it took you to turn around and go down the stairs?

A. While I was going down the stairs, I was going pretty quickly down the stairs. I wasn't casually walking. I was running down the stairs to let people in.

* * *

[25] KIMBERLY REYNOLDS,

called as a witness by the People, being first duly sworn, testified as follows:

* * *

[26] DIRECT EXAMINATION

BY MR. MITCHELL: Q. Could you please tell me what your occupation is?

A. I am a sergeant with the San Francisco Police Department.

Q. Have you received any training which qualified you for that position?

A. Yes.

Q. Just briefly describe the training you have received.

A. Nearly 18 years; I have been through the seven-month academy. I have had every two years an additional one-week advanced officers' training. I have been to numerous courses that I am [27] sure the Court doesn't want to hear every single one of them. And I couldn't tell you every one, your Honor.

THE COURT: I think a number of years qualifies her.

MR. MITCHELL: Q. Were you on duty on August 7, 2008?

A. Yes.

Q. Did you have an opportunity to respond to 1941 15th Street?

A. Yes.

Q. Did you respond there sometime between 11:00 and 12 noon?

A. That is correct.

Q. Do you recognize anyone in court today from that date, approximate time and location?

A. I do.

Q. Please identify the person by where they are sitting and what they are wearing.

A. Miss Sheehan, she sitting over there in orange.

THE COURT: The defendant is identified.

MR. MITCHELL: Q. What led you to that location that day?

A. One of my officers had called me down to assist her in a 5150 investigation, and she had a question for me, and so she called me on my cell phone and I was actually at the scene of another call. As soon as I finished that call, I responded over there to assist Officer Holder.

Q. She was already at the scene?

A. She was.

Q. Were you in uniform?

A. I was.

Q. And was Officer Holder also in uniform?

A. Yes, sir.

[28] Q. Were the two of you engaged in the performance of your duties on that date and time?

A. Yes, we were.

Q. What did you see when you arrived at that location?

A. I met Mr. Hodge, and I spoke with Katherine [sic] Holder, Officer Holder. And Officer Holder had a question as to whether or not Mr. Hodge was able to 5150 Miss Sheehan. It is not something that she had a lot of experience with or had come in contact with, even though she has done a lot of 5150s, not had she had a social worker attempt to do that, take the 5150 and issue that. So her question to me was, is he allowed to do that? And you know how to go about dealing with it"

Q. Did you make a determination that he had an ability to do that?

A. I did.

Q. What was that determination?

A. I spoke with Mr. Hodge. I looked at his pink card that he showed us here today, reviewed that, that came from the City and County, and I additionally looked at his 5150 form that he had already filled out and was aware that had established the criteria for 5150, being gravely disabled and danger to herself or others and was comfortable with that at that point.

Q. Did he tell you what the basis of the 5150 was for the defendant?

A. What I remember is, I attempted to read the paperwork and his handwriting was not completely legible to me, but somewhat between the reading of the paperwork and discussing the case with him, I remember talking about Miss Sheehan had been off her [29] medication my recollection was a year and a half. That she had been deteriorating, that she was threatening him, threatening to stab him or kill him and that he had concern for her well-being and the well-being of the clients in the house as well.

Q. What did you do at that point?

A. At that point he asked me, "Do you want me to go with you?"

I told Kat, Officer Holder, we are going to go and make contact with her. It was my intent to assess Miss Sheehan myself. Even though the social worker was able to issue his 5150, I still felt it was my responsibility to make sure she did meet that criteria. My intent was to go upstairs and evaluate her as well at that point.

While we were out on the sidewalk, Mr. Hodge, Heath, gave me the key that would open not only the upstairs room but the downstairs room. I used the key to get in the front door. We walked up the stairs. Let me back up for a minute.

Heath asked me if he wanted him to go with us – if I wanted him to go with us. And I said, "sure, you

can come up and I want to do an evaluation". And then once in my mind – and I don't recall what I said to him. Once in my mind I had assessed Miss Sheehan and it was safe enough, I was going to allow the social worker to talk to her.

So at this point I told him, "you can come up with us and I will let you know when you can talk to her". Basically used the key that he gave me. I went upstairs. Approached the front door, he pointed out specifically her room for me. And there were two doors that I recall in the room – in the house. One to the left and one to the right, and so he directed me to her room [30] specifically.

Q. Did Officer Holder come upstairs with you as well?

A. Yes, she did.

Q. Could you please describe to us the area of the hallway and the two doors there. How much space is in that area?

A. Things get very distorted in the heat of the moment, but, what I recall, the hallway was long, somewhat narrow and L-shaped. So as we came up the stairs, we could walk straight towards Miss Sheehan's door, and then off to the left would be her roommate's door, and the L shape would go sort of to the left where a wall would be – the ending part of the hallway. So I guess it would be more as you are facing Miss Sheehan, already it would be like, more like, a 7.

Q. And approximately how wide is the hallway, if you can tell us? It is standard size or is it real wide?

A. I guess standard size. Because of the shape, I think as you get closer to her door, there is a little more width there. I can't give you an exact measurement.

Q. What did you do when you got to the defendant's door?

A. Initially I took the lead, and I told Officer Holder that we were going to go in. I knocked on the door. Actually, put the key in the door at that time, and identified ourselves, and I told Miss Sheehan, "we are the police; we want to help you" Pushed the door open and found Miss Sheehan laying in bed.

Q. What happened after you opened up the door?

A. I stood at the front of the doorway at the threshold. At that point, Miss Sheehan got out of bed, yelled – and as I am looking at her laying in the bed, her head is towards me, her [31] feet is towards the back wall. She got out of bed. Yelled out "I am going to kill you". And I see her and she gets up very quickly and rapidly, and I see her get out of bed, turn immediately to her right, reaches over and there is a plate or some sort of flat surface, where there are knives on top of, she grabs a knife, and she rapidly comes forward at the door, throwing the knife out, pushing it around and yelling: "I am going to kill you. I don't need help. Get out."

Q. You are holding your hand in front of you. Could you please describe to us the nature of how the defendant was holding the knife?

A. She was sticking it out and threatening us. At that point when she initially started it, she was from the – a distance from eight feet, six feet and she rapidly walked towards the door with the knife in hand, pointing it, and then at that point slammed the door, and I had my foot in the threshold of the door, and then slammed the door. I initially had some pressure on the door, but I became fearful because she had the knife in her hand. So the door slammed on me.

Q. You are holding your hand out in front of you. Was the defendant holding the knife out in front of her?

A. Yes.

Q. Was the knife pointed at you?

A. You know, I wasn't staring exactly at the knife tip, but it was there in my peripheral. I could see the, knife pointing at me and her hand going like this (indicating).

Q. Where was Officer Holder in relationship to this?

A. At that point I believe Officer Holder was off to my left [32] because I was the person who had pushed the door open, as I believe there was a wall

here and there is no room for anybody else, and I believe Holder is over here (indicating).

Q. Approximately how far away was the defendant from you when she had the knife and at the last point before the door shut?

A. Close enough to touch the door and close the door, so two feet.

Q. At that point, when you took a glimpse into the room, the first time, were you satisfied at that point that the defendant was the only person in the room?

A. I was not. I focused immediately on the plate of knives. I think there were 2 or 3 knives there. As soon as she got up and reached over, my attention went directly to her and reaching for the knife and then her coming at me, and pretty much everything was sort of phased out at that point. I became very concerned and stressed for my safety and my officer's safety. I was not able to do a complete assessment of the entire room.

Q. Did you have any concerns there might be someone else in the room?

A. I did.

Q. After the defendant shut the door, what occurred?

A. I discussed with Officer Holder getting out pepper spray and we simultaneously, as we were backing away and the door was being slammed, we

both in a natural reaction went to draw our firearms. The door closed now. The firearms are out. I asked Holder to get out her pepper spray because at that point I was going to attempt to and I was still verbally talking to Miss Sheehan through the door, I was going to attempt to gain access and talk [33] with Miss Sheehan. And I was still in somewhat disbelief that Miss Sheehan was capable of coming at us and attack us and everything sort of was very surreal at that point.

Q. I don't know if I asked you, but could you describe the knife for us?

A. My recollection was, it was a brown or black handle. It was a dark-colored handle. I do recall it being a serrated edged knife. I would estimate the knife to be possibly 5 or 6 inches. It is probably a kitchen knife, but it is a very threatening knife.

Q. When you say 5 or 6 inches, are you talking about the blade or the blade with the handle?

A. The blade is probably 5. So something like this, so 6, 7; then the blade is 4, 5 (indicating).

Q. Okay. Of that 7 inches?

A. Let's see here, yes (indicating). Total of 6 to 7, roughly.

Q. I take it, it was a fixed blade knife?

A. Yes, it was.

Q. Continue telling us what happened outside.

A. So I asked Officer Holder to get her pepper spray out. Tell her, "if the door opens I want you to spray her and douse her with pepper spray" In the interim, both of us going to our mics to radio for help. Actually, that probably took place right before I yelled at her to get her pepper spray out. But to be honest with you. I don't know if that was before or after.

Everything was very rapid and very quick. I did go to the mic. She went and got over the air first. I backed off and let her deal with the radio.

[34] At that point. I was trying to have a conversation with Miss Sheehan, and what I recall Officer Holder saying was, I believe, calling for a code 33, and then I don't remember every word that came out of her mouth. I do remember hearing in my ear piece less-lethal were in route and more officers were on the air saying they were coming for backup, and there was a lot of chatter from dispatch.

At some point, I tell Holder, "have your pepper spray out" I attempted to push the door open with my foot at one point and was unsuccessful. I was continuing to talk to Miss Sheehan, telling her that we wanted to help her, we were not going to hurt her, and Officer Holder at some point said, "I have a little more size, I will try to open the door".

So at that point, which I had sort of blanked out originally, but I took her pepper spray. And the reason why we both didn't have our pepper spray out initially was when I was working on the door, I didn't feel comfortable having pepper spray and gun in hand

because I needed one of my hands free to deal with the situation. So when we made a decision – when I made a decision that Officer Holder was going to try to open the door, then I took her pepper spray from her, so she had, I believe, her gun in her hand and no pepper spray.

And then what happened next was that I saw Officer Holder hit the door with her shoulder, and then it clicked in my mind she will hurt her shoulder. I tapped her shoulder. Then I turned over my shoulder like this, I tapped her shoulder to kind of pull herself back because I didn't want her to hurt herself and fall through the door and end up in the room. So I turned over my [35] right shoulder and I turned out to the social worker and I clearly saw him standing at the stairwell, and I said "go open the door for the officers"

And at that point, I had heard sirens and I knew over my radio that officers were in route, and I was actually shocked at how quick the sirens were right there and it was fast, and the response time was very quick. As I turn over to tell the social worker to please open the door – I don't think I said "please" but "go get the door open" – the next thing I know, I turn around and Teresa is now coming out of the door in the threshold, and at that point I deliver pepper spray.

Q. I want to break it down a little bit. When the door opens and you see the defendant coming out of the door, where is Officer Holder at that point?

A. At that point she is a little to the left of the door. She is sort of at an angle but close to the door, and she is to the left, my left I should say.

Q. Approximately how far is she from the door?

A. No more than 3 feet. My best recollection is no more than 3 to 4 feet at the very most.

Q. And how close is the defendant to Officer Holder at that point?

A. Very close, to the point I was really afraid for Katherine [sic], and I just thought I could spray her with pepper spray and that would blind her and stop her and so –

Q. How far were you from the door?

A. Initially I was – the second time around, I was probably 5 feet, somewhere in between 4 to 5 feet. Like I said, I glanced [36] over my shoulder.

Q. When you turned back, how close would the defendant – was the defendant to you when she came out of the door?

A. Four feet; 3, 4 feet. What I did, I started to create a distance, as I simultaneously sprayed Miss Sheehan in the face with the pepper spray.

Q. Would you please describe for us how the defendant came out of the door?

A. She came through the door, knife in her left hand up in the air. She turned immediately to her

right and approached Officer Holder. I won't describe her as running but very rapidly, and she was yelling and she had the knife up in the air and she was saying "I am going to kill you" At that point I was still spraying her, but until she turned to the right, once she turned to the right I stopped spraying because what I remember, initially the pepper spray got on her glasses.

She dipped her head down a little bit. I know I got it into the eyes, and it had absolutely no effect on her. She blinked for a minute and stopped. That is when she turned toward Officer Holder, took a few more steps with the knife up in the air, and then I heard the first shot.

Q. Approximately how far was the defendant from Officer Holder?

A. At that point, I would say 2 to 3 feet, no more than. In those close quarters, couldn't have been more than 3 feet.

Q. Was the defendant outside of her room at that point?

A. Absolutely. She crossed the threshold. We were now out into the hallway. And as I described, the hallway being the L-shape or the 7-shape, Miss Sheehan had come out of the door, turned to [37] the right and Holder was at that point backing up away from her.

Q. Was there anywhere for Officer Holder to go in that area?

A. No. She had a few feet to move backwards. At some point she was stuck at the end of the wall, the hallway.

Q. Was the defendant still going towards Officer Holder when you heard the shots?

A. Yes.

Q. What happened after you heard the shots?

A. After I heard the initial shot, I discarded the pepper spray, and then I advanced forward because I knew Officer Holder was in trouble. At that point, I had the pepper spray in my left hand. I had the gun down at the floor.

After I discarded the pepper spray, I started advancing and bringing my firearm up and coming on target with Miss Sheehan. Officer Holder shot one more time. Teresa did not fall, did not stop. She still had the knife in her hand.

She turned towards me. I shot and I am not a hundred percent sure about that I shot 3 times, but I believe that is what I did. And the first 2 rounds, I shot center mass. Did not stop Miss Sheehan. She still had the knife in the air. I know my last round struck her in the face, and at that point is when Miss Sheehan fell to the ground.

Miss Sheehan fell to the ground. She still had the knife in her hand when she laid on the ground. Both of us were in shock at that point. We were pretty fearful and concerned for all of us. And I remember

coming down on Miss Sheehan, seeing the knife in her hand, and I grabbed Kat Holder; I grabbed her.

The first officers had arrived at the scene. I took Kat by [38] the shoulder. I shoved her behind me, to the officers in the hallway, and I told the first officers that arrived, who happened to be Officer John Zachos and Nash Balinton – I remember hearing Nash's voice. I saw John, and I said to John as I covered down on Miss Sheehan, "John, she, still has a knife in her hand, be careful"

I see John come through blood with his foot, I think it was his right foot slide through the blood and scrape the knife out of her hand with his foot. And then I don't know where the knife goes at that point. Everything sort of, you know, it is over and now we are dealing with the aftermath. The threat is done.

Q. When you described the defendant with the knife, you had your hand kind of in front of you above your head, kind of in a fist. I take it the defendant was holding the knife with the blade pointed towards Officer Holder?

A. The knife was towards Officer Holder, but I did not stare at the blade to see where the blade was I know her arm was up and the knife was towards Officer Holder. I don't know if it was pointed this way or this way (indicating). I know the hand was up and I saw the blade in her hand.

Q. Was the same true when she came towards you with the knife?

A. Yes.

Q. Approximately how close did the defendant get to you with the knife before she finally fell to the ground?

A. I would say I was probably three to four feet from her when she finally fell to the ground.

Q. And during this whole time she had the knife?

A. Absolutely.

[39] MR. MITCHELL: If I can have a moment?

Q. You mentioned the knife had a serrated blade. Does that have any particular significance?

A. Well, serrated blades are very sharp. I can't be certain but it could be a steak knife type and I have cut myself numerous times with knives like that, so, yes, it was scary.

MR. MITCHELL: Thank you. I have no further questions.

THE COURT: All right. We will take a five-minute recess at the request of the court reporter.

THE COURT: You may cross-examine.

MS. HATHAWAY: Thank you, your Honor.

FURTHER CROSS-EXAMINATION.

* * *

[40] Q. And you knew prior to entering the premises that there were no other residents there; is that right?

A. No, that is not right.

Q. You did not have a conversation with Mr. Hodge about him asking the other residents to leave?

A. I know he mentioned that. But I know there was a period of time where he was not in the premises, so in my mind I wasn't 100 percent sure that place was clear. Because I believe there was a long delay before I arrived on scene and I was not comfortable taking his word for it, not knowing what he had seen or whether or not Officer Holder saw people coming and going inside the building.

So that is my concern as a police officer and as a supervisor that, you know, if I did take his word for it, somebody could have been in there and something could have happened to that individual.

Q. Did you take the time to check whether or not there were other residents there prior to contacting Miss Sheehan?

A. Not initially, no. I didn't feel it was warranted at that point. I had to assess Miss Sheehan, and I had no idea things were going to unfold the way they did.

Q. And when you spoke with Mr. Hodge, he told you that he had [41] not actually seen a knife; is that right?

A. I believe that is correct. I don't remember exactly, but I do believe that came out at some point.

* * *

[42] BY MS. HATHAWAY: Q. Officer – sergeant, I am sorry, you are familiar with the general order of the San Francisco Police Department about the use of force; is that right?

A. Yes 5.01.

Q. And that is something that you are, as a sergeant, I am sure especially need to be familiar with?

A. Yes.

* * *

[44] MS. HATHAWAY: Q. And you, since you didn't have your baton, didn't try to use your baton in this case?

A. I did not.

Q. And why not?

A. We are not trained to fight people with knives with our baton. And the order that you are looking at, we are not trained to go through each and every step in succinct order before we arrive at lethal force.

We are trained to protect ourselves. We are trained to protect our fellow officers. We are trained to protect citizens. In this scenario, Officer Holder did have her baton and there is no way that that was an appropriate tool to use when Miss Sheehan [45] came at us with a knife.

Q. Were either one of you hurt?

A. We were not.

* * *

[47] Q. How do you take into account this person suffers from a mental illness? How did that factor into how you approached the situation?

A. You know, initially that is why I was trying to explain to her initially "hey, we want to help you" Believe me, I had no idea this was going to unfold this way. I had no idea that Miss Sheehan was going to do what she did. And everything I said initially was, "Miss Sheehan, we want to help you. We are the police. We are not here to, hurt you."

I am not going to be specific because I would not to be able to recall verbatim every little word I said. That was the gist of what I wanted to convey to her.

Q. Well, it was clear – was it clear to you from the first interaction you had with her that she wanted you out of her room?

A. Sure.

Q. And she slammed the door on your foot?

A. Sure.

Q. And than she managed to close the door?

A. Yes.

Q. And then what happened was, there was sort of a, kind of you [48] were shoving on one side of the door and there is force on the other side preventing you to open the door; is that right?

A. Yes.

Q. And you booted the door or kicked the door, correct?

A. Correct.

Q. How many times did you do that?

A. I don't remember. Once or twice at the most.

Q. And did you – did you try to shoulder the door also?

A. I did not, no.

Q. And when you were unsuccessful, Officer Holder, who was a little bit bigger than you, said "hey, let me try"; is that right?

A. That is right.

Q. And at that point, you both, you and Officer Holder, were trying to gain access to the room, correct?

A. Yes.

Q. And what was the plan? If you had gotten in, what was the plan?

A. As I said earlier, our pepper spray was out, our weapons at that point were drawn merely to protect ourselves. But the plan was to open the door, pepper spray her and take her into custody.

I knew she had just committed a felony threat against a social worker and committed a felony against myself, and the officer and I was not certain that she was alone in that room, and I had no idea what she was capable of.

* * *

[51] Q. Did you hear anything, see anything, observe anything that would – well, let me ask you this: Did you hear any other voice from that room, other than Miss Sheehan's?

A. No.

Q. Did you – when you were in there, during the first interaction, did you observe a second person?

A. No.

Q. So other than the general suspicion there might be another person in the room, was there anything else that led you to believe that – led you to suspect that there might be someone else in the room?

A. No.

* * *

Q. And, so how did the door open the second time?

A. That is the – I did not witness the door open, and that I believe is because when I turned my head to tell Mr. Hodge that I [52] needed the door open downstairs, as I turned back around, Miss Sheehan was coming out of the door. So I am not a hundred percent sure if the door was forced open or if Miss Sheehan opened the door on her own accord.

Q. Okay. So let me ask you some questions about what was occurring right at that time.

You had tried to access the door, right?

A. Yes.

Q. You kicked the door – you shouldered the door. And you couldn't do it, right?

A. Correct. I never shouldered the door. I did not shoulder the door. I kicked the door.

Q. You kicked the door maybe twice, and then you switched places with Officer Holder, correct?

A. That is correct.

Q. And that is when you took her mace?

A. Correct.

Q. So you had your mace in one hand your gun in the other?

A. I had her mace in one hand. My gun in one hand.

Q. And Officer Holder had her gun in her hand and was trying to shove the door open?

A. Yes.

Q. So, and were you concerned because she was really kind of shoving her shoulder so hard that you thought she might hurt herself?

A. That is correct.

Q. And she was meeting with resistance on the other side?

A. That is correct.

* * *

[53] Q. Okay. So and how long in your memory were the two of you trying to get into that door?

A. I am not going to give you a specific because I can't be specific because it was seconds. I want to say 30 seconds, maybe more. It was very – everything unfolded so quickly. These things just happen really fast, and it wasn't like I had hours to sit here and deal with the incident. It was very rapid. Everything happened and unfolded very quickly.

Q. Prior to the door opening the second time, you knew that there was other back up officers coming with less-than-lethal weapons, right?

A. Correct.

Q. Did you hear the sirens, hear the officers arrive?

A. I did.

Q. Was that before the door opened the second time?

A. I believe so. I can't be a hundred percent sure, but I believe so.

Q. How long were you looking back at Mr. Hodge to order him to go down the stairs?

A. I looked over my shoulder. I told him go downstairs and open the doors for the officers. They need to come in. I watched him [54] as he walked down to make sure he walked down to do that for us, and then I directed my attention back.

So I can't tell you. Seconds. It was enough to say what I said and then turn back around.

Q. Okay, And do you know – and during that time, where was Officer Holder?

A. I believe she was, I think, in the middle of the door at that point, doorway, outside the door but centered on the door, I believe.

Q. And was she trying to get in?

A. The last, like I said earlier, the last thing I remember of her, the last attempt I remember of her trying to get in was the shoulder thing. I tapped her on the shoulder. I didn't even say anything, at that

point. Like I said, I was worried she was going to hurt her shoulder or fall down and not be able to protect herself.

At that point, I turned to say to Mr. Hodge what I said. Took a few seconds. Then I turned back around. The door was open. Miss Sheehan was coming out. I was pepper spraying her.

Q. Stop. Did Officer Holder react to you trying to get her attention? What did she do?

A. She didn't shoulder the door at that point. She just pulled back. I think she only shouldered the door once.

Q. Okay. So she did not push the door open?

A. I can't tell you that. I am not sure. That is something you need to ask her about.

Q. So when Miss Sheehan came out of the door, where were you? Came out of her room, where were you?

[55] A. Within a few feet of the door, four, five feet of the door.

Q. When you are looking at the door – if you are looking at the door, on the right side of the door or left side of the door?

A. Just slighted canted to the right, behind her.

Q. Behind you is an opening to a bathroom?

A. I have heard there is a bathroom there. I did not see a bathroom.

Q. Did you enter or did you back up into that bathroom? Did you back up into any room?

A. No. I backed down the hallway.

Q. And when Miss Sheehan initially came out of the door, she turned towards Officer Holder, is that what you are saying?

A. That is correct.

Q. And you are saying it was seconds, and then the shot was fired?

A. Yes.

IN THE SUPERIOR COURT OF CALIFORNIA

IN THE COUNTY OF SAN FRANCISCO

THE HONORABLE RAYMOND J. ARATA, JR.,
VISITING JUDGE PRESIDING

DEPARTMENT NUMBER 18

-- o0o --

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. TERESA SHEEHAN, Defendant.	Court No. 2381035

Reporter's Transcript of Proceedings

Wednesday, September 3, 2008

PRELIMINARY HEARING

Volume 2

APPEARANCES OF COUNSEL:

For Plaintiff:

KAMALA HARRIS, DISTRICT ATTORNEY
850 Bryant Street – Suite 300
San Francisco, CA 94103
BY: **DAVID MITCHELL**,
Assistant District Attorney

For Defendant:

JEFF ADACHI, PUBLIC DEFENDER
555 Seventh Street – Suite 205
San Francisco, California 94103
BY: **K. KLEIGH HATHAWAY**,
Deputy Public Defender

WEDNESDAY, SEPTEMBER 3, 2008

- - - o0o - -

[3] **KATHRINE HOLDER,**

called as a witness for the Defendant, having been duly sworn, testified as follows:

* * *

[5] MS. HATHAWAY: Q. Thank you.

Officer, what were the circumstances of the initial interaction you had with Ms. Sheehan?

A. The initial interaction – which point do you want, when we got to her room or when we entered the building?

Q. The initial interaction you had with Ms. Sheehan.

A. It was basically a lack of interaction when we knocked on the door.

Q. And what happened?

A. Sergeant Reynolds knocked on the door stated, "San Francisco Police Department," said, "Teresa, San Francisco Police Department, we're here to help

you, we're just going to talk to you," and there was no response.

Q. And were you and Sergeant Reynolds with anyone else?

A. Yes.

Q. Who was that?

A. The social worker.

Q. And after having no response what happened then?

A. She knocked on the door again, the Sergeant knocked on the door again and repeated the – maybe not verbatim but same thing: San Francisco Police Department, Teresa, we're here to help you, talk to you.

[6] Q. At some point did you open the door?

A. I did later. Sergeant Reynolds did after that.

Q. Sergeant Reynolds opened the door. And, what did you see inside the room?

A. I saw Ms. Sheehan was – I didn't know it was Sheehan at the time – laying down on something, almost straight ahead kind of to the left. And, she was getting up saying something about, you don't have a search warrant, I've already made a police report so you can't come in my room.

Q. Okay. Did you identify yourself as the police?

A. We previously had twice.

Q. Were you in your uniform?

A. Full uniform.

Q. Was Sergeant Reynolds in her uniform?

A. Full uniform.

Q. And after she said that initial statement what did she do?

A. She turned and got up off the bed, started coming towards us saying she was going to kill us and picked up a knife.

Q. And what did you do after that?

A. I took a step backwards, and either Sergeant Reynolds or Ms. Sheehan, I'm not sure which, closed the door.

Q. And at that point did you attempt to gain entry into the room for the second time?

A. Well, in between that Sergeant Reynolds did most of the speaking because otherwise were just yelling, both of you. We identified that we were the Police Department, told to put the knife down, we just need to talk to her, we're here to help her, all those things.

[7] Skipping some steps, yes, we then attempted to break the door – open the door again, yes.

Q. So, the steps, in between the initial – well, she closed the door, you're trying to talk to her, and then you tried to break the door. What occurred between those points?

A. Okay. I called for backup. I took out my pepper spray. We both took out our weapons, our department issued weapons.

Sergeant Reynolds attempted to keep talking to her telling her we're the Police Department, we're here to help her, we need to talk to her, put the knife down.

I had called on the radio for backup. There was some confusion with Dispatch. They sent the unit to the wrong location. And then I clarified and asked the unit to go around to the back.

Sergeant Reynolds attempted to get the door open. I'm a little bit bigger than her so I told her, "Hey, let's switch."

Q. Let me stop you there. When you said, "Hey, let's switch," what did you mean?

A. Well, I'm bigger than her. It's easier for me to get more weight behind it. If I'm hitting a door it's easier for me to open it because it's – no offense, Sarge – it was kind of a feather hitting a door as opposed to a bowling ball hitting when it hits.

Q. Okay. So, prior to that was Sergeant Reynolds attempting to get into the door?

A. Yes.

Q. And how was she doing that?

A. You know, honestly, I just remember that she was trying to [8] get in the door. I know she had tried the knob and had tried pushing it a couple times. I think she hit it a couple times. I'm not sure if it was with her foot or shoulder or what. I was distracted with my pepper spray and my gun and I was trying to talk on the radio all at the same time.

Q. At some point you say, basically, "let me try"?

A. Right.

Q. And at that point did you then try to get the door open?

A. Yes.

Q. And please describe that.

A. Well, I handed her my pepper spray because it's too much going on. I was afraid I was going to lose possession of my pepper spray. And, I attempted to kick the door and it didn't work. So then I hit it a couple times with my shoulder and it kind of felt like it was budging a little bit so then I hit it again and it opened it.

Q. Okay. Now, during this time you had gained entry to the door prior with a key; is that right?

A. Yes.

Q. Okay. So, when you were shoving on the door could you tell whether or not it was locked?

A. After I kicked it and then I hit it with my shoulder a couple times or one time. I can't remember exactly that sequence. I double checked the lock to make sure it wasn't just the lock.

Q. Okay.

A. And I don't know why it couldn't open. I just know that it couldn't and it wasn't locked.

* * *

[9] Q. All right. So, at one point were you actually trying to shoulder the door open?

A. Yes.

Q. Describe what that was. I mean, what were you doing?

A. Well, I had my hand on the knob to keep it turned because obviously that would be pretty futile and backed up and just hit it with my shoulder sideways.

Q. Okay. So, just to let the record reflect, you were holding the doorknob with your right hand and then with your left arm kind of bent in a triangle up, kind of across your chest, and then pushing the door with your shoulder on here?

A. Well, there is a little bit of distance. It's actually strike to a push kind of thing.

Q. And were you able to push the door open?

A. Eventually, yes.

Q. Okay. How did that occur? I mean, did you fall into the room? What happened?

A. It opened. I'm not sure if she had been holding the door or not. I don't know if when it eventually did open it pushed her [10] back or if she was – I don't know exactly. I would had to have been on the other side of the door to see it. I don't know.

Q. Okay. So, just to be clear, your pushing effort pushed the door open.

A. Yes.

Q. Ms. Sheehan did not open the door.

A. No.

Q. Okay. And after the door was open did you see Ms. Sheehan?

A. Yes.

Q. And what happened?

A. She was – oh, boy. I'd say somewhere five to eight feet from me at this point.

She had turned away from me, back towards the windows which were straight south of me, straight ahead of me. She turned back around again, had a knife in her hand. I believe it was her left hand. Again stated that she was going to kill you, singular, plural, I don't know, and started walking towards us.

Q. Okay. And at that point where were you and Sergeant Reynolds?

A. When I got the door open I kind of went forward a step. So, I had basically one foot in the door. And then I was coming back up again when she was turning and she raised the knife again said she was going to kill you. And, Sergeant Reynolds was kind of behind me still because I needed room to get the door open.

Q. Okay.

A. So, we were out the door, one foot in.

Q. Did Ms. Sheehan come out of the room?

[11] A. Yes.

Q. And how did she get out of the room?

A. She started walking towards us with the knife raised saying she was going to kill either or both of us.

And, I saw the stream of pepper spray go past me and strike her in the face and she kept walking right into it. It had absolutely no effect that I could see.

Sergeant Reynolds, I couldn't see her anymore, but she was yelling. I don't remember the exact words at this point. I can guess what they were, but, I don't remember exactly.

And I didn't want to back down the hallway because she had her weapon out of her holster and I don't want to have a gun to my back. Also, I would have been in the way of pepper spray. So, I took kind of a sidestep, back sidestep to my left which would be

east of the door, right, and that put me in kind of a cut off corner of a trapezoid.

There's Ms. Sheehan's door, another door, and then there's a door at probably a – I don't know, a 30-degree angle. I don't know if there was a door or a wall right there. I'm not sure. But, there was something solid right there. And I was backed up to it as far as I could go and my back was literally against the wall, my heels were kind of making a triangle out of the corner.

She continued walking forward. She had the knife raised. She turned towards me and kind of with a little bit of a forward lean to her body as if one would do if you were to start walking and I had no avenue of escape, so, I fired my department weapon.

Q. Do you know whether or not you actually hit her with the round?

[12] A. Did I know at that time?

Q. Yes.

A. I do not recall seeing any physical wounds at the time. I know I had been told afterwards and I remember seeing her flinch.

Q. After she was shot did she fall to the floor?

A. No.

Q. When did she fall to the floor?

A. Well, at this point Sergeant Reynolds came back up from where she had been when she pepper sprayed her and she turned toward Sergeant Reynolds and kind of leaned towards where she was going as if she was going to go towards Sergeant Reynolds also with the knife raised. And, Sergeant Reynolds discharged her weapon.

And, she was falling and she made like a swiping motion towards Sergeant Reynolds' leg. And I don't recall at this point if she was already on the ground. I believe that's when it was or not, but, I do remember very distinctly her making a swiping motion with the knife towards the sergeant's leg and then she discharged an additional round.

Q. You remember actually giving a tape-recorded statement to the officers that day; is that right?

A. Yes.

Q. And you remember being asked pretty similar questions?

A. Um-hmm.

Q. And you remember being asked when the last shot was fired, do you recall that?

A. Not specifically.

[13] Q. Okay. You remember telling the officers at that point that Ms. Sheehan was already on the ground when the last shot was fired?

A. Yes.

Q. And that you remember then Sergeant Reynolds shot Ms. Sheehan in the face when she was already on the ground?

A. Yes.

Q. Okay. Is that what you remember today?

A. The picture in my head, that's what it is.

Q. Okay. And you understand that you're under oath?

A. Yeah, absolutely.

Q. And so, that's your memory?

A. Absolutely my memory.

Q. So, how long did it take for – well, actually let me ask you this. Do you know how many rounds you fired?

A. I have an idea but I can't say specifically because nobody's told me.

Q. I understand that and that's what I'm asking is your recollection if you have an idea of how many rounds you fired?

A. I believe I fired two.

Q. And do you have any idea how many rounds Sergeant Reynolds fired?

A. I believe she fired three.

Q. And the first four shots, were those, you know, literally almost simultaneous? I mean, what was of the timing of those?

A. Yeah. They're – I fired first. I don't know if it was me, her, me, her or me, me, her, her, but, they're very – there is a split second between each one. You could distinctly hear each [14] round. They didn't cover each other, if that's what you're asking.

Q. That's what I'm asking.

And after the shots were fired did she fall to the ground?

A. Yes.

Q. And then after she fell to the ground the last shot was fired?

A. In my recollection, yes.

Q. Prior to pushing the door, do you recall Sergeant Reynolds telling the social worker to do anything?

A. Not independently, no.

Q. And prior to pushing the door open, do you recall Sergeant Reynolds trying to get your attention in any way, tapping on the shoulder, telling you to stop trying to open the door?

A. No.

Q. And where were you after the shots were fired?

A. I was still in that little corner. I was probably – it's so hard to say, it was so close. She was literally laying at my feet and I was in that corner with nowhere else to go.

* * *

MS. HATHAWAY: Q. Did you and Sergeant Reynolds have a plan in regard to what was going to happen once you forced your way [15] through the door?

A. No.

* * *

MS. HATHAWAY: Q. And, Officer, did you have your department-issued baton to use that day?

A. Yes, I did.

Q. And did you use your department-issued baton on Ms. Sheehan?

A. No, I did not.

Q. Did you try to use the baton on Ms. Sheehan?

A. No, I did not.

Q. And the time when you first took your gun out of its holster was when?

A. After she had gotten up, turned, said made her police report, search warrant, I'm going to kill you, grabbed the knife, started coming towards us,

door slammed; we were both going for our weapons at that point.

* * *

[16] MS. HATHAWAY: Q. How close would you say the knife came to you?

A. If I'd have had my gun out to point, arm's reach, I would have been well within striking distance of Ms. Sheehan.

Q. And when she came out of the room how was she holding the knife?

A. She was holding it up in her hand with the knife blade facing towards me in a striking position.

Q. And what was she doing with the knife, if anything?

A. She was holding it up in the air in striking position.

* * *

MS. HATHAWAY: Q. So, when she came out of the room she held it up, the knife was towards you, was she actually striking out at you with the knife?

A. Not that I recall.

Q. Okay. And back in the room when you were in the room – [17] actually the first time the door opened did you actually go in the room?

A. The first time the door opened?

Q. Yes.

A. No.

Q. At that time when you first saw her reach for a knife, what was she doing once she got the knife in her hand, if anything, with the knife?

A. I know she raised it up. I don't recall if she moved it at all.

Q. All right. And after Ms. Sheehan fell to the ground what did you do, if anything?

A. As she still had the weapon in her hand, I kept my weapon trained on her because, as I stated before, I had nowhere – I couldn't go anywhere without stepping over somebody who is armed and I believed to just having tried to stab me, so, I kept my weapon trained on her until other officers arrived.

Q. And you were in that little sort of niche area until other officers arrived?

A. Yes.

* * *

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

BEFORE THE HONORABLE TERI L. JACKSON,
JUDGE PRESIDING

DEPARTMENT NUMBER 29

-- o0o --

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. TERESA SHEEHAN, Defendant.	SCN 206458 Court No. 2381035 **HOLDER AND ZACHOS TESTIMONY** Pages 1-190

Reporter's Transcript of Proceedings

November 20 and 24, 2008

APPEARANCES OF COUNSEL:

For Plaintiff:

KAMALA HARRIS, DISTRICT ATTORNEY
850 Bryant Street – Suite 300
San Francisco, California 94103
BY: **DAVID MITCHELL,**
Assistant District Attorney

For Defendant:

JEFF ADACHI, PUBLIC DEFENDER
555 Seventh Street – Suite 205
San Francisco, California 94103
BY: **K. KLEIGH HATHAWAY,**
Deputy Public Defender

Reported By: Judith N. Thomsen,
CSR #5591, RMR, CRR

* * *

[51] MR. MITCHELL: Q. And could you describe to us the defendant's position at that time, what she was doing.

[OFFICER HOLDER:] A. She was walking forward, towards the threshold of the door.

Q. Where was the knife at that time?

A. In her hand.

Q. Was it in the same position during this –

THE COURT: That's leading, counsel.

MR. MITCHELL: Okay.

Q. Where – how was her hand positioned?

A. She still had it up.

Q. Okay.

A. Her arm in a downward, slashing motion.

MR. MITCHELL: If the record could reflect that the officer did hold her hand up at a 90-degree angle at the elbow.

THE COURT: The record will so reflect.

MR. MITCHELL: Q. Was the defendant saying anything during this time?

A. She had said more than once that she was going to kill me, and I don't remember exactly what steps she was on when she said it. I just know that during that motion forward, she stated more than once, "I'm going to kill you."

Q. After you saw the pepper spray hit the defendant, describe to us what occurred.

A. Okay. She continued forward. And, as she broke the threshold of the door, she – again with her arm raised with a knife in it turned towards me in the corner, as if she was going to start coming towards me with the knife.

[52] Q. And could you tell us where you were at that point.

A. I was along this wall (indicating). I was backed up all the way to it. This door was closed. I actually – I didn't know there was a door there. I didn't know if it was a wall or a door or what. I just knew there was something I couldn't get past right there.

THE COURT: Can you describe the area?

MR. MITCHELL: And the officer is referring to the side of the wall with the kitchen door on it.

THE COURT: Okay.

MR. MITCHELL: Q. Approximately how far away was the defendant from you when she started turning towards you?

A. I'd say three to five feet.

Q. What occurred at that point?

A. She turned towards me with the knife raised.

And do I say what I thought or no?

THE COURT: No, just what you observed.

THE WITNESS: Okay. She turned towards me with the knife raised, and I observed that she was a threat to my safety. And I could not put my arm up to take aim because she was too close and she would have been able to – how do I say that? She would have been able to stab my arm if I had my arm all the way out at that point. So I fired from the hip.

MR. MITCHELL: Q. Describe to us what that means, "firing from the hip."

A. Hip shooting is when your opponent is too close to you for you to be able to take aim and fire with your sight. So you have your gun, whichever – I am right-handed so it would be my [53] right hip. I had my gun right by my right hip at my waistline, and I fired from there.

Q. Now, why is it that you fired your gun?

A. I thought she was going to kill me.

Q. And when you fired your gun, how close was the defendant to you?

A. I would say about three feet.

Q. And do you recall approximately how many times you fired your gun?

A. Two to three.

Q. And what did you observe as you were firing your gun in terms of the defendant's reaction?

A. She didn't really do anything. All she did was flinch.

Q. What happened at that point?

A. She turned towards Sergeant Reynolds and started walking towards her with the knife raised in the downward, slashing motion.

Q. Could you describe to us, using diagram number 3, approximately where the defendant was when she changed directions towards Sergeant Reynolds.

A. She was just outside the threshold.

Q. And, again, it appears that the laser pointer is by the marker 4 on the diagram 3.

THE COURT: The record will so reflect.

MR. MITCHELL: Q. What did you do at that point?

A. I kept my weapon trained on her.

Q. And did you observe what the defendant did?

A. She looked as if she was taking a step forward to start [54] proceeding down the hallway.

Q. What did you observe occur at that time?

A. I more heard at this point. I still couldn't quite see Sergeant Reynolds. And it was split seconds, really. I had fired my weapon, and she turned and proceeded to start going down the hallway, and then Sergeant Reynolds discharged her weapon.

Q. How much time had elapsed from when the door opened to you firing your firearm, if you can recall?

A. It was seconds. I would be shocked if it was over five seconds.

Q. What were you doing as the defendant moved down the hallway?

A. I still kept my weapon trained on her.

Q. Were you able to observe the defendant?

A. Yes.

Q. And please describe to us what you observed.

A. Well, she didn't – after Sergeant Reynolds discharged her firearm, she began falling, and she fell right about here (indicating). I believe her feet were right kind of at the doorway, the threshold, and she fell with her head pointing northbound towards the opening, the front of the house.

Q. Okay.

A. And when she hit the ground, she was still – I don't know which way the knife was in her hand. I

don't remember. But she was going like this (indicating). And I remember seeing Sergeant Reynolds' leg –

THE COURT: Could you just one second?

THE WITNESS: Okay.

[55] THE COURT: Give a description of what we just saw.

MR. MITCHELL: Right. And I believe you had kind of the knife in the hand and you were moving your hand back.

THE COURT: The left hand?

THE WITNESS: I thought it was her right hand.

THE COURT: Okay.

THE WITNESS: Actually.

MR. MITCHELL: Q. All right. So the knife was in her right hand at that point?

A. I believe so.

Q. And describe to us what the defendant was doing with the knife.

A. She was going like this (indicating). I felt she was moving her –

THE COURT: No, no, no, not what you felt. Can you –

THE WITNESS: Okay. I saw her moving the knife over her head, as if she was trying to stab Sergeant Reynolds' leg.

MS. HATHAWAY: Objection. Move to strike.

THE COURT: I am just going to allow it, moving over her head.

THE WITNESS: Okay.

THE COURT: Disregard the other part. Okay.

MR. MITCHELL: Q. Based on what you observed, did you believe that Sergeant Reynolds was in danger?

A. Yes.

Q. What led you to believe that?

A. Her leg was right where the knife was, where Ms. Sheehan was moving the knife.

[56] Q. Approximately how close was the defendant to Sergeant Reynolds at that point?

A. A couple of feet, a foot and a half.

Q. What did you observe occur at that time?

A. It's kind of hard because I was – I was turning. She fell kind of behind me. And I believe that that is when Sergeant Reynolds discharged the last round.

Q. Now, where were you during this time?

A. I was still over here in the corner by the kitchen doorway.

Q. And you had mentioned before you weren't able to see Sergeant Reynolds from that location.

A. I could see just the front of her leg, like, her knee, mid – most of the way down her thigh down. Her knee was bent.

Q. Were you able to see Sergeant Reynolds' upper body at that point?

A. No.

Q. When was that it you were able to see Sergeant Reynolds completely?

A. Actually, it was – it was much later. Ms. Sheehan didn't – wouldn't let go of the knife, and another officer had to run in and kick the knife out of her hand. And once the knife was out of her hand and there was no longer a threat, then I looked up, and that's when I could see Sergeant Reynolds completely.

Q. Prior to that time you mentioned someone came by and kicked the knife. Prior to that time were you able to move from that area, that triangle area, of the diagram?

A. No.

[57] Q. Why was that?

A. Because there was still somebody who had just said – I had just heard tell me that she was going

to kill me. She was still armed with a knife, and she had just tried to stab me. So I didn't feel that it would be safe for me to step over her when she was still armed.

* * *

[135] Q. And the last shot was from Sergeant Reynolds' gun; correct?

A. Yes.

Q. And the last shot was into the face of Ms. Sheehan when she was already on the ground?

A. Yes.

* * *

NOELLE J. OTTOBONI & ASSOCIATES
Certified Shorthand Reporters
106 Madison Avenue
San Bruno, California 94066
650/588/7404
Fax 650/866-4430

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

TERESA SHEEHAN,

Plaintiff,

vs. No. C09-03889 CRB

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation; HEATHER FONG, in her capacity as Chief of Police for the CITY AND COUNTY OF SAN FRANCISCO; KIMBERLY REYNOLDS, individually, and in her capacity as a police officer for the CITY AND COUNTY OF SAN FRANCISCO; KATHERINE [sic] HOLDER, individually and in her capacity as a police officer for the CITY AND COUNTY OF SAN FRANCISCO; and, San Francisco police officers DOES 1-25, inclusive,

Defendants. /

VIDEOTAPED DEPOSITION OF HEATH HODGE

Thursday, October 14, 2010

Reported by:
JULIEANN HAMILL, RPR, CRR, CSR No. 5151

* * *

[10] Q. What was your position as of August 7, 2008?

A. My position was program director for the Conard House cooperative apartment program.

Q. What did that position involve?

A. That position involved supervising a team of five case managers working in the cooperative apartment program and running the support – supportive piece of the cooperative apartment program with – working with residents. It involved supervising, running groups, [11] individual counseling, supportive counseling, case management, advocacy.

* * *

[19] Q. Okay. Now, there's one thing that you mentioned in the call that I wanted to ask you about. And there is a point – and I'm happy – if you'd like me to replay it, I'm happy to, but – so just say so, but I wanted to ask you about this.

You mentioned to the dispatch operator that Ms. Sheehan had a history of making violent threats and aggressive behavior.

Why did you say that?

A. Well, I said that because – I said that because, to my mind at the time, I was trying to remember in her record, and I had thought that there was an incident that had happened sometime before then.

I also said that because I wanted to, you know, make sure that the police did come and that they came in a timely manner.

Q. Did you believe it to be true at the time that you said it, that Ms. Sheehan had a history of violent threats and aggressive behavior?

A. I believed that there was an incident or two from her past that I was remembering.

* * *

[20] Q. BY MR. KEITH: So, Mr. Hodge, I've handed you a one-page exhibit marked as Exhibit 103.

Could you identify that document, please?

A. Yeah. This is the application for 72-hour detention, a 5150 form.

Q. Okay. And is this a form that you filled out?

A. Yes.

Q. Okay. And did you fill it out on August 7, 2008?

A. Yes.

Q. And did you fill this form out before any police arrived at 1941 15th Street?

A. Yes.

Q. Okay. Now, because some of the – I mean, because this is handwritten, what I'd like you to do is [21] actually read the form word for word to make sure that we know what it is that you've written and that we don't make any assumptions about things that may not be legible to those of us who didn't write it.

What I'm going to ask you to do is to read the paragraph beginning after "The above person's condition," in the middle of the page.

Do you see that paragraph that you wrote?

A. The second paragraph?

Q. The first paragraph.

A. Oh, okay.

Q. "The client has been."

A. Okay. You want me to read the whole thing?

Q. Yeah. Could you?

A. Okay. "Client has been without psychotropic meds times one and a half years. Has been presenting with increased symptoms for several weeks. Client has not been seen by the house counselor times two weeks. Housemates reported that client has been coming and going at odd hours and reportedly said

she had stopped eating. It was also reported that client has been wearing the same clothing for several days. Writer conducted outreach to client and she was not responsive. Made no sound – made no sound behind her closed door. Writer and property management keyed in for wellness [22] check.

"Client, upon opening the door, client was found lying in her bed with a book over her face, eyes open and was not responsive. Addressed client several times and she did not move or answer. Client then suddenly got up, threw the covers, and yelled at writer violently, 'Get out of here! You don't have a warrant! I have a knife and I'll kill you if I have to!' Client then slammed" the door – "her door and locked it behind her."

Q. Okay. And when you refer to client, is that referring to Teresa Sheehan?

A. Yes.

Q. And when you refer to writer, is that referring to you?

A. Yes.

Q. And then there are some check boxes checked on Exhibit 103.

There's a check box next to "A danger to others" that's checked, and there's a check box next to "Gravely disabled adult" that's checked.

A. Uh-huh. Yes.

Q. I wanted to ask you about the term "gravely disabled." Could you explain in lay terms what gravely disabled means?

[23] A. Gravely disabled means that a person is no longer able to take care of themselves, their basic needs: Food, clothing, or shelter.

Q. And does the term – I mean, does the term "gravely disabled," the way that you use it in your professional, I guess, context, different from say a person who would use the word "disability" with regard to say someone who might be in a wheelchair?

A. Yes.

Q. Okay. And how is it different?

A. Because someone in a wheelchair might be able to provide food, clothing, and shelter for themselves. And someone who is gravely disabled in our profession is not taking care of their basic needs.

Q. And that's a definition from the Welfare and Institutions Code?

A. Yeah.

Q. Okay. And – okay. There is – and then you also signed Exhibit 103?

A. Yes.

Q. And do you have authority to – to make a 5150 detention?

A. Yes.

Q. And what's the basis for your authority?

A. I went to the City and County of San Francisco [24] 5150 training and completed the test afterwards. And also because I, at the time, was a program director. Yeah.

Q. Okay. And so you receive a – you receive a card, essentially documentation from the City and County of San Francisco that says this person is authorized to make a 5150 detention?

A. Yes.

Q. And what does a 5150 detention involve?

A. A 5150 detention involves a person being involuntarily taken to an emergency room and held for up to 72 hours to be evaluated by psychiatric professionals, medical doctor, to evaluate as to whether they need care.

* * *

[42] Q. Okay. Now, there's a notation at the end of the client progress note that writer, meaning you, I assume, was taken to the Valencia Street precinct for questioning.

Is that a reference to the interview that you gave to the homicide inspectors?

A. No. I was – as soon as the event happened and the gunshots went off and I was – somebody ran past me through the door, and I found myself just

standing out in front of the building dumbfounded, and some police [end of p. 42]

* * *

[55] Q. Okay. All right. Okay. All right. So now that we've kind of gone over these preliminary documents, I'd like to – I'd like to ask you some more questions about what happened on the date of August 7, 2008.

It's my understanding that you went to 1941 15th Street with Mr. Mike Creeger, and he was accompanying you for the purposes of essentially helping you key into Ms. Sheehan's room.

A. Yes.

Q. Okay. And then when you arrived at 1941 15th Street, was there a tenant named Elaine who was present in the apartment?

A. Yes.

Q. Okay. What happened with Elaine?

A. Can you –

Q. I'm sorry. Did you make contact with Elaine when you got to the apartment?

A. Yes.

* * *

[57] Q. Okay. My question was a little different.

To see – to make your initial contact with Elaine, not Ms. Sheehan, did – was Elaine cooperative when you first contacted her when you got to the apartment?

A. Yes.

Q. Okay. Was – and when you – when you first contacted Elaine when you got to the apartment, was Mr. Creeger with you or was he somewhere else in the apartment?

A. I don't remember –

Q. Okay.

A. – exactly.

Q. Okay. So – now, you mention that Mr. Creeger assisted you with – with actually keying into Ms. Sheehan's room?

A. Yes.

Q. Okay. Did you try and get Ms. Sheehan to open the door voluntarily first?

A. Yes.

Q. Okay. What did you do?

A. Knocked on the door and announced who I was, I [58] was there to see her, I wanted to check in on her. And kind of our protocol, we knock at least three times before we key into someone's room. And

we announce it, make sure that if they are in there, that they know what we're going to be doing, knock on the door, "I'm here to check on you, I'm concerned about you," wait, knock again, and then when there's no response the third time, say, "Okay, I'm going to key into the room now."

Q. Now, is there a certain – you mentioned a protocol. Is there a special protocol or a certain protocol that Conard House – I'm sorry – Conard House uses when making a well check on a resident?

A. That's kind of it.

* * *

[59] Does Conard House have a policy that it requires tenants to adhere to with regard to – to having to accept well checks?

A. I believe so.

Q. Okay. And then you mention the protocol is to basically knock and try for a response three times before actually entering a tenant's room?

A. Yes.

Q. Okay. And you tried that protocol with Ms. Sheehan?

A. Yes.

Q. And was she responsive at all?

A. No.

Q. Okay. And what did you do next?

A. We – Mike, I think, opened the door. And as it stated – as we've already heard, I kind of saw her there and attempted to engage her a couple of times, kind of slowly, each time moving closer to where she was in her bed and just trying to engage her, "Teresa, are you okay? Can you say anything? Can you let me know that you're okay?"

[60] Q. And do you remember repeating questions like that a couple of times?

A. Yes.

Q. Okay. And Ms. Sheehan's position was that she was lying on her bed?

A. Yes.

Q. And was her head closer to you at the door –

A. Yeah.

Q. – or was her feet?

A. Her head.

Q. Okay. And she was face up with a book held a few inches from her face?

A. The book kind of resting on her face and her eyes were exposed and I could see her eyes were open.

Q. Okay. So you recall the book being on her face not being held up?

A. Yeah.

Q. Okay.

A. Yes.

Q. And you recall her eyes being open, not closed?

A. Yes.

Q. And she was kind of staring in a fixed way?

A. Yes.

Q. Okay. And – so Ms. Sheehan initially was not responsive to you after you entered the room?

[61] A. (Nodding head.)

Q. How long did you – were you asking her questions before she finally did something?

A. A couple of minutes. It wasn't long.

Q. Okay. And how did Ms. Sheehan finally respond to you?

A. She – like I said, she threw the covers off. And she was, you know, fully clothed and jumped up. And she was angry and yelled for me to get out of there, that I didn't have a right to be there. And then she made the statement that she had a knife and that she would kill me if she had to. And that's when I left the room and she shut the door.

Q. Okay. Do you recall where Mr. Creeger was at the time when Ms. Sheehan came up out of the bed?

A. To my recollection, he was in – not in the room. He wasn't with me. He was somewhere else in the apartment.

Q. And at the point when Ms. Sheehan came out of the bed and made these statements to you, you were actually – were you actually inside of her room by then?

A. I was inside of her room, yeah.

Q. What was the condition of her room?

A. You know, it was a couple of minutes. I didn't [62] have a lot of time. I was – as I was initially in her room, I was more focused on her; but I know that her room was cluttered. You know, I remember seeing bugs, you know, some gnats and flies, and it was a mess.

Q. Like fruit flies?

A. I think. Yeah.

MR. NISENBAUM: Fruit flies?

MR. KEITH: I said fruit flies.

MR. NISENBAUM: As opposed to some other type of flies, specifically fruit flies?

MR. KEITH: Do you have an objection?

MR. NISENBAUM: Yeah. Objection, calls for speculation.

Q. BY MR. KEITH: Now – now, Ms. Sheehan told you that she had a knife, but you didn't see a knife at that point?

A. No.

Q. And after Ms. Sheehan made these statements to you, what did you do?

A. I left the room. And she shut the door behind me. And then I went and – I think the first person I saw was Mike. And, you know, I was pretty – I was upset because I knew that at that point, you know, it wasn't going to go over well and that I needed to do some sort of intervention.

[63] And, you know, I spoke briefly with Mike. And I think I told him, you know, that – just talked – checked in with him, and he was going to leave anyways. He had to go and do something. He's not involved in working directly with clients, so I didn't share information with him.

And I talked with Elaine and suggested that – as I said, that maybe she should take off, you know, checked in with her, what are you up to today; and she said she was getting ready to go, and I said okay. And made sure that no other housemates were there, because there's two other people that live there.

And then I went out to my car and got a 5150 form and filled it out and –

Q. I'll stop you there because I'm going to ask you a bunch of questions.

A. Okay.

Q. Okay. So – so with Mr. Creeger you made a point to not tell him what had happened because essentially it wasn't his concern. Is that fair to say?

A. Yeah. I mean –

Q. Okay. And likewise with Elaine, you tried to mini- – you minimized the information –

A. Yeah.

Q. – so that she'd stay calm?

[64] A. Yes.

Q. Okay. And when you left the room, were you at all concerned that Ms. Sheehan might come after you?

A. No.

Q. Okay. Were you concerned that if you stayed in the room that the confrontation might escalate?

A. Yes. I mean, I took what she said seriously. I took that she was very angry and that she did not want me in her room. And – so yes.

Q. Okay. Now, you mentioned that you went down to your car to get the 5150 form?

A. (Nodding head.)

Q. Is that the same form that we marked earlier as Exhibit 103?

A. Yes.

Q. Okay. And now when you went down to the car to get the form, had you called – had you called the police yet?

A. No.

Q. Okay. So tell me about what happened after you left the flat and went down to your car.

A. What happened was that I filled out this form. And – and I think I called the police after that. Called the, you know, the nonemergency number, made the initial call.

* * *

[66] Q. Okay. Now, do you recall going down to the corner store to get a bottle of water while you waited for the officers?

A. Oh, yes.

Q. Okay.

A. Uh-huh.

Q. Now, tell me about your conversation with the first officer to arrive, Officer Holder.

A. Well, when she arrived, I explained to her what the situation was. And she asked me if this was a Tarasoff case.

And she didn't really seem to me to have a clear understanding of the difference between a 5150 and a

Tarasoff. As I tried to kind of explain that, no, it was not a Tarasoff, it was a 5150 situation.

And we had some, you know, brief miscommunication around that, at which point she said, you know what, I'll call my sergeant and get someone [67] else out here.

Q. Was the issue – did you understand the source of the confusion to be whether – whether you had the authority to do a 5150 or was it something else or was it the nature of the call?

A. It seemed that she was not clear about what I had called them about, even though – she didn't seem to be – have a clear understanding of a 5150.

Q. Okay.

A. That was what I – yeah.

Q. And did you show – did you show her the 5150 application that you had written, Exhibit 103?

A. Uh-huh.

Q. Yes?

A. Yes. Yes.

Q. And when you mentioned that you briefed her on the situation, can you tell me a little bit more about what – can you tell me a little bit more about what specific information you gave her?

A. Yes. I told her exactly what had happened upstairs and the interaction that Teresa and I had

had at which Teresa made the statement that she made.

Q. Okay. That she had a knife and would kill you if you didn't leave?

A. If she had to, yes.

[68] Q. I'm sorry. That she had a knife and would kill you if she had to?

A. Yes.

Q. And did you – did you brief Officer Holder on a little bit of the history of Ms. Sheehan with regard to – to any of her behavior recently?

A. No, we did not get into that because she kept asking me if this was a Tarasoff situation. And at that point she then called for someone else to get there to help clarify things.

Q. Okay. So – so with regard to Officer Holder, you basically told her about the interaction that you'd just had?

A. And that I had called the police to help assist with a 5150.

* * *

[69] Q. Okay. Again, that's Sergeant Reynolds.

So what happened after Sergeant Reynolds arrived at the scene?

A. Well, I explained to her that I – you know, the situation. She was much more knowledgeable and

fluent in what a 5150 was, what the situation was, and clarified what I wanted – what I was calling them for.

I explained that I felt, you know, that I – that I was placing Teresa on a 5150 and that I would need their assistance in transporting her to the hospital, that she was not going to go willingly.

Q. Is that – now, is that the kind of circumstance where – where it's Conard House protocol to call police for assistance where a resident isn't [70] going to go willingly?

A. Yes.

Q. Okay. And did – did you go over your 5150 application with Sergeant Reynolds?

A. Yes.

Q. Okay. So the information contained in Exhibit 103 you conveyed to her?

A. Yes.

Q. Okay. And was this conversation with the officers outside the flat?

A. Yeah, I was outside. Yes.

Q. Okay. And about how long did the conversation take after Sergeant Reynolds arrived?

A. Maybe five minutes.

Q. Okay. And – and what happened after you briefed Sergeant Reynolds on the – on what had happened with Ms. Sheehan, showed her the form, and essentially said where I'm asking for your assistance to transport the subject, what happened after that?

A. I led them up into the apartment, and we went to Teresa's bedroom door.

Q. Okay. And was her bedroom door closed at that time?

A. Yes.

Q. Was it also locked?

[71] A. Yes.

Q. Did you have the key at that point?

A. Yes.

Q. Okay. And as you approached the bedroom door – was there any discussion before you went inside about – about who was going to do what once everyone was upstairs?

A. Yes.

Q. Tell me about that.

A. We just discussed that I would – that we'd all go to the door and knock on the door and I would, you know – that – yeah, actually I don't remember details of what the discussion was, but I know that we briefly discussed going to the door and letting Teresa know that – that we – that the police were there.

Q. Okay. So as you approached Ms. Sheehan's door, did you take the lead?

A. I believe so.

Q. Okay. And who made con – who said something first to Ms. Sheehan through the door?

A. You know, I don't want – I don't remember –

Q. Okay.

A. – clearly.

Q. So did somebody – did somebody say something through the closed door to Ms. Sheehan?

[72] A. Yes.

Q. Okay. And do you remember the gist of what was said to her?

A. I think the gist was, you know, that we're here to help you. We're concerned about you.

I think one of the officers, maybe Sergeant Reynolds, said, you know, Heath here says that, you know, you're not doing okay, something like that. I don't remember. I don't want to say – I don't want to make it up. I don't remember it clearly.

Q. Okay. And, again, just, you know, as well as you can remember, did – did either – did somebody say, "Oh, and, you know, and these police officers are here to help," to essentially identify to Ms. Sheehan that there were police present?

A. Yes.

Q. Okay.

A. Yes.

Q. And was there any response from her at that point?

A. I – I think so, but I don't remember.

Q. Okay. So had you unlocked her door at this point?

A. No.

Q. Okay. Did one of the officers unlock her door?

[73] A. I gave them – gave one – I think Sergeant Reynolds – or I don't remember which one. I gave one of them the key.

Q. Okay. At what point did you give one of them the key?

A. I don't remember.

Q. Had there been any response from Ms. Sheehan at the time that you gave them the key?

A. I don't remember that.

Q. That's okay.

A. Yeah.

Q. Now, at some point did one of the officers open the door?

A. Yes.

Q. Okay. What happened after an officer opened the door?

A. To my memory, Teresa was in her doorway and had a small knife in her hand and was yelling, you know, for them to get out of there, that we had no right to be there.

Q. Okay. And was it along the lines of what you said in the homicide interview: "Get out of here, I've called the police, they are coming, you have no right to be in here, I'll kill you"?

A. Yes.

[74] Q. And did she say that several times, "If you come near me, I'll kill you"?

A. Yes.

Q. And I have a photograph here that I'd like to show you. We'll mark it as the next in order.

What exhibit are we on now?

THE REPORTER: 109.

MR. NISENBAUM: 108 was the tape?

MS. ORRANTIA: Yeah.

MR. KEITH: Yes.

(Exhibit 109 was marked.)

Q. BY MR. KEITH: Now, I guess, you know, rather than ask you to describe the knife, I just want to ask you, you know, do you remember – do you remember what it looked like, and was it the knife that's shown in Exhibit 109?

A. That looks like it, yes.

Q. Okay. So how far was Ms. Sheehan when she – when she had the knife in her hands, when the door was opened from the officers?

A. I can't say exactly.

Q. And at the point when the door was open and you saw Ms. Sheehan with the knife in her hand, were you behind the officers?

A. Yes.

[75] Q. Okay. About how far down the hall were you from the officers if you could estimate in feet?

A. Initially I was right behind them; but then I – as things escalated, I was at the end of the hallway at the very top of the stairs.

Q. All right. Now, did the officers take their guns out after Ms. Sheehan brandished the knife?

A. Yes. I think. I mean, I know they took them out –

Q. Okay.

A. – pretty quickly after things started to escalate.

Q. Okay. So they didn't – okay. Okay.

Now, tell me about how things proceeded after Ms. Sheehan said, "If you come near me, I'll kill you," and made those statements?

A. As far as I can remember, I think she slammed her door shut and locked it. At which point the police were trying to figure out how to get into her room. They asked me if there was a way in through the back.

They, you know, were very – you know, they made a call about – I forget the code for someone having a weapon.

They were trying to communicate with each other about what to do. Sergeant Reynolds at one point, you [76] know, said, "Get your Mace," and was going to kick the door open. They were communicating about that. And I was standing at the top of the stairs.

Q. Okay. And so they were both talking with each other about what to do and also talking on their radios?

A. Sergeant Reynolds made a call on her radio in her shoulder.

Q. Okay. And at this point had the officers asked you to do anything yet?

A. No. It wasn't until they asked me to go and make sure the door was open.

Q. Okay. So you mentioned these communications they were having with each other about – about what to do and that Sergeant Reynolds was having on her radio.

Did they have any other types of communications before asking you to go downstairs and get the door?

A. With me?

Q. Yeah. No. With each other.

A. No. They were mostly just commun – trying to figure out how to get into the room and what to do and.

Q. Okay. Can you tell me what you remember about their conversation with each other at that point?

A. It wasn't – I mean, just what I've already stated.

[77] Q. Okay. Was it pretty brief?

A. Yes.

Q. Okay. And then at some point did one of the officers direct you to do something?

A. Yes.

Q. Okay. What was that?

A. To open the front door.

Q. Okay.

A. To make sure the door was open for the back-up.

Q. Okay. And could you hear sirens?

A. Yes.

Q. Okay. And at the point when – and so did you – did you follow that order?

A. Yes.

Q. Okay. And at the point – and so I take it you went down the stairs?

A. Yes.

Q. And at the point when you went down the stairs, was Ms. Sheehan's door still closed?

A. I don't believe so.

Q. Okay.

A. No.

Q. Okay. Tell me what happened with regard to Ms. Sheehan's door.

A. I don't remember completely but – yeah.

[78] Q. Okay.

A. But I think – yeah, I think they had kicked it open or pushed it open.

Q. Okay. Were you still on the same floor?

A. I think so.

Q. Okay. So you hadn't yet gone downstairs when that happened?

A. Yeah.

Q. Okay. And did you observe anything that happened after the door was open with regard to Ms. Sheehan before going down the stairs?

A. I don't – what do you –

Q. Well, okay. So you mention recalling the door being open when you went downstairs.

A. (Nodding head.)

Q. And the question that I have is, before you went downstairs to let in the backup, did you observe any of the further interactions between Ms. Sheehan and the officers after the door was open?

A. I don't remember.

Q. Okay.

A. I know that there was – people were saying things, and she was yelling. She was very upset.

Q. Okay. Do you recall the nature of what she was saying? Was it along the same lines of what she said [79] earlier?

A. Yeah, along the same lines of what she said earlier. And I believe, you know, the officers were telling her to put the knife down or, you know.

Q. Uh-huh.

A. But I don't remember exactly word for word what was said.

Q. Okay. And about how long had this – okay. Let me step back for a minute.

Okay. So we talked about an interaction that happened and then the door closed and then the door opened again and there was further interaction between Ms. Sheehan and the officers.

How long had this second interaction been going on before you went down the stairs to let in the backup?

A. I can't say.

Q. Okay. Less than a minute?

A. A couple of minutes.

Q. Okay. And what did you observe about Ms. Sheehan's demeanor during that second interaction?

A. She was very angry, very upset.

Q. Was her voice raised?

A. Yes. She was yelling.

* * *

[86] Q. You didn't call 911?

A. Yes.

Q. Okay. And why did you call nonemergency as opposed to 911?

A. Because we – we don't call 911 for assistance with a 5150.

Q. Okay.

A. It wasn't an imminent situation.

Q. Okay. And by not an imminent situation, meaning that if the police came in five minutes as opposed to say an hour, it probably wouldn't make much difference; is that right?

MR. KEITH: Objection, calls for speculation.

MS. SANKARY: If you know whether it would make a difference; but if you don't, you know, you can just respond with what you know or don't know.

THE WITNESS: Okay. I want to say no, wouldn't – not necessarily it wouldn't have made a difference.

Q. BY MR. NISENBAUM: Okay. Well, when you say – I'm trying to understand what you mean by not an imminent situation.

A. I – what I meant was I didn't feel that Teresa was going to come charging out of her room and try and [87] injure someone. There was no one in the apartment at that point, first of all. I was outside. And I didn't believe that she was going to harm herself.

Q. Okay. And I notice you didn't include – you didn't mention the term "suicide" or "suicide risk" anywhere either in the phone call or on the 5150 form; is that right?

A. Yes.

Q. Okay. And also – well, when the police arrived, ultimately there were two police who arrived, first it was Officer Holder and then Sergeant Reynolds came, correct?

A. Yes.

Q. Okay. Did you ever indicate to either of them that there was a potential suicide risk with Teresa?

A. No.

* * *

[89] Q. Okay. So I think you mentioned earlier in the deposition that there was an incident or two with Teresa that had occurred prior where there might have been some threat or potential violence with Teresa.

But that was nothing that you related to the officers, correct?

A. Correct.

Q. Okay. And you didn't relate those incidents to the dispatcher either –

MR. KEITH: Objection –

Q. BY MR. NISENBAUM: – or to the person you spoke with over the – during the call you made to the police department?

A. No.

MR. KEITH: Objection, vague, best evidence.

Q. BY MR. NISENBAUM: No, you did not?

A. No, I did not.

MR. KEITH: Same objection.

Q. BY MR. NISENBAUM: Thank you.

At any point in time did you tell either of the officers that arrived that there was no one else in the residence other than Teresa?

A. I think I did tell them that.

Q. Okay. Do you have a sense of when you told – told them that?

[90] A. I think outside before we entered the building.

Q. Okay. Do you recall if they asked you about that?

A. I feel like they did, but I don't – I mean, it's not clear to me, but I feel like they did. That's kind of standard protocol I think.

Q. Okay. And at any point in time, did it appear to you that the officers had a concern that there was someone other than Teresa in Teresa's room?

MR. KEITH: Objection, calls for speculation.

THE WITNESS: No.

Q. BY MR. NISENBAUM: Okay. And did they – were you able to overhear the officers talking to each other when – when you were present outside of Teresa's room?

A. Was I able to overhear them talking to each other?

Q. Yeah.

A. Not clearly.

Q. Okay. Well, what I mean is –

A. I mean, what are you asking?

Q. What I mean is this: Did it appear to you, just based on your observations of the officers and seeing their actions, hearing what they were saying and being present when you were present, that the officers were concerned that there might be someone else in the [91] room with Teresa?

MR. KEITH: Objection, calls for speculation.

THE WITNESS: Not to my recollection.

Q. BY MR. NISENBAUM: Okay. And did the officers ask you – strike that.

If I understand your testimony correctly, the officers were asking you about other ways to get into Teresa's room than through her door; is that right?

A. Yes.

Q. Okay. Were there other ways to get into her room than the door?

A. There – it's a second-floor apartment so it would only be through the window, which is not a – I mean, you have to have a ladder to get in through the window on the second floor.

Q. Yeah. And was – did you have any discussion with the officers that the only other way into her room would be through the windows?

A. I think so. Not a discussion but I think I answered for them.

Q. Okay. And was there – was there any question about whether or not there was a fire escape that she – that could be used?

A. No.

Q. Okay. Was there any question by the officers [92] to you about whether or not Teresa's windows were open or closed, her second-floor windows?

A. Not to my recollection, no.

Q. And do you know whether or not those windows open or close?

A. I believe they open and close.

Q. If they do open, then they would close I would assume.

A. Yeah.

Q. Okay. You said it's a second-floor apartment?

A. Yeah.

Q. And in order to go from – if a person were to leave the apartment through the back, through those windows, do you have an estimate of about how far the drop would be from the windows to the ground?

A. I mean, it would be a one story I guess. I mean, the second – from the second floor, no, I don't have an estimate of how far it would be.

Q. Okay. That's fine.

A. But I fee ike there's probably a fire escape, but I don't know for sure. I can't remember.

* * *

[104] Q. Okay. Do you know how the door got closed?

A. I don't clearly remember that, and I feel like she slammed it shut.

Q. Okay. From the time when the door was opened to the time when the door was slammed shut, did Teresa make any stabbing motion with the knife?

A. I don't – I mean, I don't think so. I mean, she didn't really make a stabbing motion so much as she had it in her hand and was kind of, you know, holding it.

Q. Okay. And in your own mind, though, did you have a concern that Teresa was trying to get out of the room in order to stab someone?

A. In that moment, is that what you –

Q. Yeah. In your own mind.

A. Like one of the officers?

Q. Sure.

A. In that moment, no.

Q. Okay. Teresa expressed that she wanted to be left alone; is that right?

A. Yes.

* * *

[112] Q. I'll ask you the same question but in a very different way. Very different question.

Once Teresa had slammed the door closed, did she appear at that point in time to be a further threat to the officers?

MR. KEITH: Objection, argumentative, calls for speculation.

Q. BY MR. NISENBAUM: Just based on your observation.

MR. KEITH: Same objections.

THE WITNESS: I mean, no.

* * *

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE NORTHERN
DISTRICT OF CALIFORNIA

TERESA SHEEHAN, Plaintiffs, vs. CITY AND COUNTY OF SAN FRANCISCO, et al. Defendants.	)	No.: C09-03889 CRB

DEPOSITION OF OFFICER E.R. BALINTON

WEDNESDAY, OCTOBER 27, 2010

REPORTED BY: BARBARA J. BUTLER, CSR No. 5604

[LOGO] ***Barbara J. Butler & Associates***
CERTIFIED COURT REPORTERS

Peninsula/San Jose/
Southern Counties
1659 Scott Blvd., #15 –
P.O. Box 3508
Santa Clara, California
95055
(408) 248-BUTLER (2885)

Northern/East Bay Area
(San Francisco/Oakland)
(510) 83-BUTLER (28853)

* * *

[79] MR. NISENBAUM: Let's look at the next photograph is Bates 80. And this will be K, Exhibit K.

(WHEREUPON, Plaintiff's Exhibit K was marked for Identification, and is attached, hereto.)

MR. LOEBS: Do you want to put a K on the back?

MR. NISENBAUM: Well, yeah.

Q. Does Exhibit K reflect an area or location where you first observed where either Officer Holder or Officer Reynolds was when you first observed either of them?

A. (Examining photograph.) Yes.

Q. Okay. Can, you use, using a pen, can you indicate where either of them were positioned when you [80] first observed them. You can do a circle with their initials.

A. (Marking on photograph.) This isn't exact. She was in front of this door (indicating).

Q. Okay.

A. Would you rather me do it or put an arrow towards where?

Q. Yeah, I want the location clear, so.

A. (Marking on photograph.) Okay, about somewhere in here. That's Kim Reynolds.

Q. Okay. And where was Officer Holder, if you can see her?

A. Couldn't see her.

Q. Okay. And where was the person on the floor, if you can see that person?

A. I'll put S for suspect.

Q. Why don't you put TS for Teresa Sheehan.

A. This pen is awful.

Q. I may have a pen that works better than that. Try a blue highlighter.

A. Okay. (Marking on photograph.) Yeah, that's better.

Q. Okay.

And which, which location – strike that.

Which direction was Miss Sheehan's head pointing [81] in?

A. Sort of northwesterly.

Q. Okay. That doesn't really help me with the, with the picture. But can you indicate, draw a smaller circle showing where her head was.

A. (Marking on photograph.)

Q. Okay. And where were her legs?

Actually, what I want, what I – okay. So you have drawn, you have drawn a TS that has a big circle around it, correct?

A. Correct.

Q. And you have drawn a circle that cross sects with that big circle, correct?

A. Correct.

Q. And that circle that cross sects with the big circle is Miss Sheehan's head, correct?

A. Correct.

Q. Okay. Can you put an H next to it?

A. (Marking on photograph.)

Q. And you have also drawn a circle that is not connected to the big circle in any way. Can you put – and that represents Miss Sheehan's legs, correct?

A. Yes.

Q. Can you put an L next to that circle?

A. (Marking on photograph.)

* * *

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE
NORTHERN DISTRICT OF CALIFORNIA

– – o0o – –

TERESA SHEEHAN, Plaintiffs, vs. CITY AND COUNTY OF SAN FRANCISCO, et al. Defendants.	)	No.: C09-03889-CRB

DEPOSITION OF OFFICER CONSTANTINE ZACHOS

FRIDAY, OCTOBER 29, 2010 [MORNING]

REPORTED BY:
BARBARA J. BUTLER, CSR No. 5604

[LOGO] ***Barbara J. Butler & Associates***
CERTIFIED COURT REPORTERS

Peninsula/San Jose/
Southern Counties
1659 Scott Blvd., #15 –
P.O. Box 3508
Santa Clara, California
95055
(408) 248-BUTLER (2885)

Northern/East Bay Area
(San Francisco/Oakland)
(510)83-BUTLER(28853)

* * *

[80] Q. Right. You could essentially make out most of her body, correct?

A. That's correct.

Q. Okay.

And did you see a person on the floor?

A. Yes.

Q. Okay. And was that a person who you later learned to be Teresa Sheehan?

A. That's correct.

Q. And what position was Miss Sheehan in?

A. She was on the floor. Her head would be towards me, her feet would be towards Officer Holder. She had her – she wasn't on her back. She was more on her side, so I guess it would be her left side with her right arm up above her head, waiving [sic] a knife back and forth.

* * *

[99] A. Okay. You got me confused now. Okay? Because I thought we were talking about at the end of the hallway. Now we have moved up to me kicking the knife out of her hand now.

Q. Well, her position didn't change, right, or did it?

A. Well, I don't remember her position changing.

Q. Okay.

A. All – the one thing that I can tell you is when I got down to the end of the hallway I saw now another door. I saw another door. I saw other things, you know. And I had a clearer picture where of what she was – Miss Sheehan was against. And that would possibly be more against the door.

Q. Right.

A. But now, I can't tell you, okay, was her, specifically, her shoulder against that door or her arm against the door. I just remember her being against that area. Now, part of it was part of the end of the hallway the door. And so how much of her body was part of the door, part of the hallway? I couldn't tell you today.

Q. Okay.

And I take it, you had your gun out at the time you kicked the knife out of Miss Sheehan's hand; is that [100] correct?

A. That's correct.

Q. Okay.

And then once you – do you have a sense of how much time passed from the time you, you heard the last gunshot that you heard to the point when you kicked the, the knife out of Miss Sheehan's hand?

A. I have no idea.

Q. Okay.

Would you have a sense of whether it was less than 20 seconds? You know it wasn't five minutes, right?

A. Yes, I mean, all, all this th- – all these things happened within three to five seconds.

Q. Okay. All right. It was a matter of seconds?

A. That is correct.

Q. All right.

And where did the knife go?

A. I want to say it just kind of fell to the floor. It didn't go too far, because I remember I ended up kicking it again into the room.

Q. Okay.

And after you kicked the knife into the room, what happened next?

A. I took a position between the knife, the knife [101] and Miss Sheehan. I remember grabbing Officer Holder and moving, physically, moving her out of her location.

* * *

NOELLE J. OTTOBONI & ASSOCIATES
Certified Shorthand Reporters
106 Madison Avenue
San Bruno, California 94066
Phone 650/588-7404 Fax 650/866-4430

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

TERESA SHEEHAN,

Plaintiff,

v. No. C09-03889 CRB

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation; HEATHER FONG, in her capacity as Chief of Police for the CITY AND COUNTY OF SAN FRANCISCO; KIMBERLY REYNOLDS, individually, and in her capacity as a police officer for the CITY AND COUNTY OF SAN FRANCISCO; KATHERINE [sic] HOLDER, individually and in her capacity as a police officer for the CITY AND COUNTY OF SAN FRANCISCO; and, San Francisco police officers DOES 1-25, inclusive,

Defendants. /

DEPOSITION OF
OFFICER CONSTANTINE ZACHOS
Friday, October 29, 2010 [AFTERNOON]

* * *

[20] Q. Okay. Now, I was asking you just a moment before about there was a call you heard, "Person with a knife; officer needs assistance," or something of that effect. I asked you before some questions about where this ranks in the seriousness of calls that you receive.

Now, you've received calls for with people with guns, people with knives; is that correct?

A. That's correct.

Q. Okay. Now, with respect to the risk to an officer with a knife, as far as you're aware and in your training, what effect does a bulletproof vest that officers wear have on stopping a wound from a knife?

A. None.

Q. How about with a bullet?

A. The vest is designed to – I won't use the word stop a bullet, but it is designed to slow down the impact of a bullet based on the fibers that are woven and the trauma plate that is located in the [21] vest.

Q. So, Officer, from your perspective, when responding to a call, "Person with a knife; officer needs assistance," when you hear a call like that, could you be thinking that a knife could even be more dangerous to an officer than a gun?

MR. NISENBAUM: Objection. Leading.

THE WITNESS: Yes.

BY MR. LOEBS:

Q. Okay. And why?

A. Because the number of areas that a person could attack with a knife on the body could cause serious damage and then be fatal. And the attacker wouldn't necessarily need to attack somebody, hit them in the chest or back. They could attack them in the neck, the leg, the arms. And dependent on the wound, there is no way to stop the bleeding for that person to end up bleeding out.

* * *

[34] Q. At what point did you hear the shots fired?

A. I want to say I was at the door or just, you know, prior to the door, but I was in that area, maybe just inside the door, but I can't specifically – when I heard the initial shots being fired, I just know I was around near the door area.

Q. Okay. And you said you hear the shots. Did you actually hear the actual shots themselves or you just heard it called out over the radio?

A. No. I heard the actual shots being fired.

Q. And you could tell they were gun shots?

A. Correct.

Q. Do you recall how many you heard?

A. No. I just heard several shots being fired.

* * *

[39] But first let me ask you, the first flight of stairs that is depicted in Exhibit 121, how did you go up those stairs? In other words, did you walk? Did you run? What did you do?

A. I ran up those stairs.

Q. Why were you running?

A. Because the officers needed assistance regarding the person with the knife.

Q. Okay. Even though you hadn't heard the shots being fired yet, you were running?

A. That's correct.

Q. Okay. After you heard the shots fired, how did you proceed?

A. I increased my speed up the stairwell.

Q. Okay.

A. And ran even faster.

Q. All right. And the next stairwell you went up, let me ask you – look at Exhibit 123 and ask you if you recognize that.

A. Yes.

Q. What is that?

A. That's the interior stairwell that leads to the – I believe probably the first floor.

Q. Okay. And so this is after entering the [40] front door?

A. That's correct.

Q. Okay.

MR. NISENBAUM: I think I have that marked as 122 in mine.

MR. LOEBS: Oh, it is 122. Excuse me. Exhibit 122.

MR. NISENBAUM: His is wrong.

MR. LOEBS: No. I think it's the tab. The numbers are right in front.

MR. NISENBAUM: Oh, because you have the tab on the picture instead of – that should be on the next tab, the 123.

MR. LOEBS: Right.

Q. Okay. So looking at Exhibit 122.

A. Yes.

Q. Okay. And what is that?

A. That's the interior stairwell that leads to the first floor.

* * *

[43] Q. What is the first thing you saw when you looked down the hall?

A. When I looked down the hallway, again, I saw Officer Holder, and I see the suspect on the ground, but her – she is not completely on the ground.

Her right shoulder is up off the ground. Her arm is above her head. Her arm appeared to be extended, and there was a knife in her right hand, and she appeared to be waving a knife back and forth towards Officer Holder and Sergeant Reynolds.

Q. All right. Let me back up for a second.

When you first looked down the hall, you saw Officer Holder?

A. That's correct.

Q. Okay. And you say you saw the suspect on the ground?

A. That's correct.

Q. Okay. And what was Officer Holder doing when you first saw her, or appeared to be doing?

A. It appeared to be that she was trapped. It appeared that she was located in a position that she couldn't move. It appeared that she was almost directly on top of the suspect. And there was a wall behind Officer Holder, so it appeared that she [44] couldn't move.

Q. Let me stop you for just a second.

The suspect you're referring to, that's Teresa Sheehan?

A. That's correct.

Q. Did you know her at that time?

A. No.

Q. Okay. Now you know her to be Teresa Sheehan?

A. That's correct.

Q. So I will just refer to her as Mrs. Sheehan.

So when you first got up the stairs, you saw Officer Holder standing down the hall and you saw Ms. Sheehan on the ground; is that right?

A. That's correct.

Q. And you said she had a knife in her hand?

A. That's correct.

Q. How close was Officer Holder to Ms. Sheehan when you first saw her?

A. It appeared that Officer Holder was standing almost directly on top of Ms. Sheehan, and – and could actually reach Officer Holder.

Q. Could she reach her with her right hand?

A. Yes.

[45] Q. The one she was holding a knife?

A. Yes.

Q. The knife that you saw, could you describe that for me.

A. It appeared to be a fixed blade, approximately six inches; kind of a butcher's knife or a steak knife, something, but it had a fixed blade.

Q. How long would you say that you thought the blade was?

A. About six inches.

Q. Okay. How about the handle?

MR. NISENBAUM: Objection. Calls for speculation.

THE WITNESS: I couldn't tell the length of the handle, but Ms. Sheehan's hand was completely around the handle, so whatever the size of her hand is, that's what I thought the length of the handle was.

BY MR. LOEBS:

Q. Okay. And what was Ms. Sheehan doing with the knife when you saw her in this proximity to Officer Holder?

A. As I said, she was waving a knife back and forth towards Officer Holder and Sergeant Reynolds [46] and raising her shoulder, right shoulder off the ground, as if to strike Officer Holder or Sergeant Reynolds.

MR. NISENBAUM: Objection. Calls for speculation.

BY MR. LOEBS:

Q. Using your arm, can you show us how you saw Ms. Sheehan moving with a knife?

A. Like this, back and forth, maybe more out to the side. But it was kind of – I want to say it was forward and then kind of back. And then again when she would go forward, her shoulder would come off the ground.

Q. And where was she in relation to you versus her head and her feet?

A. Her head would be facing me. Her feet was towards Officer Holder, and her feet – Officer Holder appeared to be in between her legs – of Ms. Sheehan's.

Q. You mentioned Sergeant Reynolds. Where was Sergeant Reynolds in relation to Ms. Sheehan and Officer Holder?

A. She would be off to my right, but be off to Officer Holder's left. They appeared to be kind of opposite of each other. And I would say [47] Sergeant Reynolds was – appeared to be a foot, foot and a half away from Officer Holder's location, but towards my location.

She wasn't – they were kind of directly opposite each other, but I would say if the distance – Sergeant Reynolds was closer to me than Officer Holder, but

they were closer to each other, if I am making that clear enough.

It was basically Officer Holder appeared to be at the end of the hallway. Sergeant Reynolds appeared to be a couple of – a foot, foot and half away from that, and then they both – both Officer Holder and Sergeant Reynolds in direct line of each other or the direct line of fire with each other.

Q. I have a diagram and we will use that in a minute to help further explain exactly where everyone was in relation to themselves and to you.

But from what you saw when you first came up the stairs, in the relationship between Sergeant Reynolds and Ms. Sheehan, was Sergeant Reynolds within striking distance of Ms. Sheehan while she was on the ground?

A. Yes.

Q. Within striking distance of the knife?

A. Yes.

[48] Q. With a six-inch blade?

A. Yes.

Q. From your experience, could that be used as a lethal weapon?

A. Yes.

Q. When you came up the stairs, did you have any fear that either Officer Reynolds – or Sergeant

Reynolds or Officer Holder or both were in lethal danger?

A. Yes.

Q. And why is that?

A. Because it's at that point that I was about to take – I basically had taken a position to fire at the suspect, Ms. Sheehan, as she was in her location, and –

Q. But my question is why did you think that there was a potential lethal threat to Officer Holder and Sergeant Reynolds?

A. Because she was taking the knife back and forth towards them, as if – to me, it appears that she was trying to strike them with the knife.

Q. You mentioned before about Officer Holder appearing to be trapped. What do you mean by that?

A. What I observed, Officer Holder appeared to have a wall behind her. The suspect was – she [49] was either between Ms. Sheehan's legs or just to the right of her leg, but it appeared that she couldn't – she couldn't go forward because then she would go into the knife. She couldn't go back because she had a wall behind her. It appeared that she couldn't – she really couldn't go – it would be to my right – to her left, because again she would still be going towards the knife.

And then again, it appeared that she was trapped of what I could tell.

Q. Now, you described – again, you described the position of the two officers.

Did you make any assessment as to the nature of their tactical position with respect to this incident when you saw them?

A. Well, tactically, it appeared to be they had been split. The suspect had split them, and now they were in the direct line of fire of each other.

Q. And why is that – was that a concern to you?

A. Yes.

Q. Why?

A. Because now neither officer could continue to fire at the suspect without hitting the other officer.

[50] Q. Have you heard the term "crossfire"?

A. That's correct.

Q. Is that what this refers to?

A. Yes.

Q. Okay. And so when you first came up the stairs, how quickly did you have to take in this whole scene?

A. Seconds.

Q. And what was your assessment as to the risk, if any, of the officers?

A. The officers were still in a lethal situation. The suspect was still trying to attack the officers. The officers could not fire due to their location, and they could not move based on the location that they were in.

Q. What, if anything, did you have in mind to do to assist the officers at that time?

A. It's at that particular moment in time that I decided I was going to take a shot at the suspect.

Q. You were going to use your weapon?

A. That's correct.

Q. And the suspect is on the ground at this time, right?

A. That's correct.

[51] Q. And you still thought it would have been appropriate to use your weapon to shoot the suspect?

A. Yes.

Q. Why?

A. Because, as I said, the suspect still had the ability to attack the officers with the knife, and that's what I believe she was still trying to do. And so I felt that based on the lives of the officers that I need to take a shot to stop Ms. Sheehan from attacking the police officers.

Q. Okay. Let me ask you this. If, let's say, you had the ERIW in your hand at that time as you came

up the stairs. In your view, would it have been appropriate to use it?

MR. NISENBAUM: Objection. Improper opinion.

THE WITNESS: No.

BY MR. LOEBS:

Q. Why not?

A. Because the extended range –

MR. NISENBAUM: Go ahead.

THE WITNESS: The extended range impact weapon is designed to cause a pain compliance technique. The person is already attacking the police officer with a knife. We don't engage people [52] in pain compliance techniques to stop them from killing a police officer. It's at that point we use that force to stop the threat and it's at that point it's a lethal force that we would use to stop the threat.

BY MR. LOEBS:

Q. Okay. And that's why you were contemplating taking a shot?

A. That is correct.

Q. Would you say "a shot," do you mean just one?

A. No.

Q. What do you mean?

A. I would continue to fire until the suspect stopped the threat against the officers.

Q. And what would that entail? How would you know when the threat was stopped?

A. When the suspect stopped moving, the suspected dropped the knife, and the knife was no longer in proximity to the suspect and could not be reached by the suspect.

Q. All three of those things?

A. Correct.

Q. Okay. Did you shoot?

A. No.

[53] Q. Why not?

A. I know as I lined up on Ms. Sheehan to take the shot, I noticed Officer Holder was still in the direct line of fire. And there was – as I'm moving down the left side of the wall – because I had moved from my location from the right side of the hallway down to the left side of the hallway. And it's down the left side of the hallway that when I was on the left side, that's where I was trying to take the position to shoot, but I couldn't shoot because Officer Holder was in my direct line of fire.

Q. Okay. So what did you decide to do?

A. In my mind, I was telling myself I would move closer to get a better shot at the suspect.

And then as I moved closer, I realized, okay. I'm going to get as close as I can so – to take a shot that I'm almost on top of the suspect, but not – and not have Officer Holder in the line of fire.

The problem I came up to was the closer I got in to take that shot, Officer Holder was still in the direct line of fire.

So eventually, I go – I figure, okay. Well, I will go past Ms. Sheehan. As I thought at [54] that point, I believe I will go past Ms. Sheehan, go past the knife, and then I will be in a better position because of Ms. Sheehan's location. I won't have Officer Holder or even Sergeant Reynolds in my direct line of fire.

The problem I came up to was I'm coming against a person that's still waving the knife, trying to attack the two police officers. And now I'm in proximity of this knife. Now, I can be attacked. And so now I'm confronted with what do I do now?

I know I have to – I know I'm confronted with I need to take a shot, but I've got to make sure that Officer Holder or even Sergeant Reynolds are not in the direct line of fire. I know I've got to get past the knife, but I don't want to go over the knife because I don't want to get stabbed.

And so now I'm confronted with I need to do something. I need to take some action. I just can't stand there and do nothing.

And so it's at that point, confronted with all these bad options I had – I don't want to say I made a poor

choice, but I made, you know, kind of a rash decision by kicking the knife out of her hand.

Q. You kicked the knife?

[55] A. Yes.

Q. How did you do that?

A. I kind of braced my foot either on her shoulder, along the ground. And I remember with a soccer-style sweep kick, kicking the back of her hand, as she's waving the knife, out of her hand.

Now, I didn't hit the knife. I hit either the back of her hand or I hit her wrist.

Q. Okay. And when you did this, where was Officer Holder?

A. Officer Holder was still in the location that she was at, which was directly – it would be towards my front.

Q. Did she still appeared to be trapped to you?

A. Yes.

Q. Where was Sergeant Reynolds?

A. Sergeant Reynolds would be towards my right now. And I want to say that she was maybe even with me or maybe just ahead or just behind me, but roughly the same level I am. I want to say she was more probably still just ahead of me.

Q. Was she still within striking distance of Ms. Sheehan?

A. Yes.

[56] Q. Now, this maneuver you made to kick the knife out of her hand, is this something that you're taught to do in the academy?

A. No.

Q. How does that fit within the training that you received in the academy?

A. It doesn't.

Q. Why not?

A. We are taught various techniques to use, verbal, physical control holds. And then we have or are taught to use pepper spray, baton, all the way up to the firearm, the use of force.

But one of the main things that we teach is we don't want to engage in hand-to-hand combat with armed suspects because – due to the risk of injury to the officers.

And the biggest – the greatest problem we have is if an officer is injured and the suspect is attacking an officer, we have an officer down. So someone then is going to have to rescue that officer from the person that is attacking that person, while still dealing with the suspect, so we have two problems then. Instead of one problem just dealing with the suspect, we have

then created two problems, and it only compounds the issue that is already at [57] hand.

Q. All right. So – hang on just a second.

Going back to your decision to kick the knife out of her hand, why did you do that?

MR. NISENBAUM: Objection. Asked and answered.

THE WITNESS: The main reason why I did it is because I realized I was too close to the situation now where I could be attacked. I can't just stop and go back and stand there and do nothing. I have to take some type of action. The officers are still possibly being – are still in danger of being attacked. And so confronted with – and I still can't take a shot because Officer Holder is still in the line of fire. And it's at that point, confronted with bad choices, I chose one that possibly may – that I thought may or may not work.

But again, I will say this. That doesn't make my choice right or correct. In fact, it makes it more incorrect because the fact of the matter is I used – you know, I engaged an armed suspect in basically hand-to-hand combat, which that's not the way I was trained.

BY MR. LOEBS:

Q. Did you put yourself at risk by doing [58] this?

A. Yes.

Q. When you kicked her arm or hand, what happened?

A. The knife kind of fell out, and it fell on the ground, but it was still in close proximity to Ms. Sheehan.

So as a result I ended up kicking the knife again, and I ended up kicking it into the room with a door that's opened.

Q. Okay. What did you do next?

A. I placed myself in between Ms. Sheehan and the knife, and so I was approximately in that doorway that was partially open.

I know I grabbed Officer Holder and moved her, physically moved her out of her location because she was still trapped in the location that she was in. She still couldn't move. And so I know I moved her – it would be towards my left, and I think she eventually ends up going back down the hallway.

* * *

[60] Q. Now, I'm going to refer you to Exhibit 124. What is that?

A. That's the hallway.

Q. Now, we see in this exhibit there are certain markers along the ground. You see a 7 a 4 and a 3.

[61] A. Yes.

Q. Do you know what those are? Not what they're marking, but what they are?

A. Yes. Usually CSI puts markings on the ground to note particular things.

Q. Okay. So these appear to be markings that are put after the fact by the investigative unit?

A. That's correct, the Crime Scene Investigation Unit.

Q. Those weren't there at the time you were going down the hall?

A. No.

Q. What is Exhibit 124?

A. It's the hallway that I moved down where it also shows the door that was partially open that the knife ended up in. It shows the left side of the hallway. It shows the right side. It shows kind of a little doorway or some type of pillar on the right side, but I guess that's a little more than halfway down the – three-quarters of the way down to the hallway.

* * *

[63] Q. Looking at Exhibit 124, we've got a blue pen here. I was wondering if you could just mark – and just on the floor area – representing kind of where the officers' feet would have been in general, and then just kind of a circle representing their approximate location. And then I will ask you the same thing with Ms. Sheehan.

So first I will ask you to put a circle, just the general area to the extent you can see it on this photograph, where Officer Holder was, and then put a circle with an H inside of it.

Okay. And could you put in general the area where Ms. Sheehan was, a circle with an S?

Okay. Can I see that? All right.

And then for Officer – Sergeant Reynolds, rather, could you put a circle with an R inside of it?

Okay. Thanks.

MR. NISENBAUM: Thank you.

BY MR. LOEBS:

Q. I am going to ask you to look at Exhibit 125. What is that?

A. 125. Closer picture of the end of the hallway with the door open, and –

* * *

[64] Q. You mentioned before that you saw a knife in Ms. Sheehan's hand; is that right?

A. That's correct.

Q. And you kicked the knife?

A. That's correct.

Q. I ask you to look at Exhibit 109 and ask you if you recognize that, what's depicted in that exhibit.

A. That's the knife.

Q. Exhibit 109, that's the knife you saw in Ms. Sheehan's hand?

A. That's correct.

* * *

Q. Okay. Looking at Exhibit 127, do you recognize what's depicted in the middle of that exhibit?

[65] A. Yes.

Q. What is that?

A. The same knife.

Q. Okay. This time it has a measuring device around it?

A. That's correct.

Q. Exhibit 128, do you recognize that?

A. Yes.

Q. And what is that?

A. The knife.

Q. Okay. Exhibit 129, do you recognize that?

A. Yes.

Q. What is that?

A. That's still the same knife.

* * *

[67] Q. Have you been taught at what distance from you a knife should be considered a lethal weapon for a police officer?

A. Yes. Roughly it's about 21 feet.

Q. And what do you mean by that?

A. The time that it would take a suspect to attack an officer and have that officer draw his firearm and to hopefully stop the threat is about 21 feet. Suspects with a knife can run approximately 21 feet by the time that officer gets his weapon out of the holster and draws and fires.

Q. And what kind of training have you had about this distance, about the potential value of a knife within that distance?

A. That any closer range, more likely you're going to be seriously injured, killed, or receive great bodily injury because the suspect will be on top of you, attacking you with a knife, and then ultimately taking your firearm from you.

Q. We were talking before about the hallway and where you saw Officer Holder and Officer Reynolds. I want to hand you a diagram of the [68] hallway and it's not to scale. But just for general reference, I would like you to look at that, please. It's Exhibit 140. Take a moment to take it in. We will give you the original.

Have you looked at that?

A. Yes.

Q. Does that diagram – just in general, what does it depict?

A. It appears to be the floor plan of the premises to include – it would be the additional bedrooms, kitchen, laundry room, living room areas.

Q. Okay. Now, are you able – on this diagram, would you be able to place where you were at the point you reached the top of the stairs and came around the corner and could see Ms. Sheehan, Officer Holder and Sergeant Reynolds?

A. Yes.

Q. Okay. Using – use this pen. It might be easier. Could you do a Z1 for yourself with a circle around it for the approximate location you were when you first saw Officer Holder, Sergeant Reynolds and Ms. Sheehan.

Have you done that?

A. Yes.

Q. Okay. Just put a circle around it.

[69] And could you – on the same diagram, at the time when you first saw Officer Holder, can you put an H1 with a circle around it for her approximate location when you first saw her.

All right. And can you do the same thing for where Ms. Sheehan was when you first saw her, and put an S1.

And can you put an R1 for the location of Sergeant Reynolds when you first saw her.

Okay. And you see on this diagram, if you look to – I guess to the east of the location where you have Officer Holder, do you see there is something indicated that's "kitchen"?

A. Yes.

Q. And there is a door to the kitchen?

A. Yes.

Q. Was that door open or closed at the time this incident occurred?

A. It was closed.

Q. Do you see bedroom No. 4?

A. Yes.

Q. And there is a doorway to bedroom No. 4?

A. Yes.

Q. Was that door open or closed at the time this incident occurred?

[70] A. It was closed.

Q. Okay. And you see the – there is a bathroom that's directly across from the kitchen?

A. Yes.

Q. And there is a doorway to that?

A. Yes.

Q. Was that open or closed at the time this incident occurred?

A. The door to the bathroom?

Q. Yes, that's across from the kitchen.

A. Where I put behind – are we talking about this?

Q. Right where you put Sergeant Reynolds.

A. That door, I don't remember if it was open or closed.

Q. Okay. And the door to bedroom No. 3, was that door open or closed at the time the incident occurred?

A. That door was partially open.

Q. Now, at some point, you said you kicked the knife and Ms. Sheehan dropped the knife; is that right?

A. That's correct.

Q. You said you kicked it a second time?

A. That's correct.

* * *

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE
NORTHERN DISTRICT OF CALIFORNIA

– – o0o – –

TERESA SHEEHAN, Plaintiffs, vs. CITY AND COUNTY OF SAN FRANCISCO, et al. Defendants.	)	No.: C09-03889 CRB

DEPOSITION OF OFFICER
KATHRINE HOLDER

TUESDAY, NOVEMBER 2, 2010

REPORTED BY:
KELLY L. McKISSACK, CSR No. 13430

[LOGO] ***Barbara J. Butler & Associates***
CERTIFIED COURT REPORTERS

Peninsula/San Jose/
Southern Counties
1659 Scott Blvd., #15 –
P.O. Box 3508
Santa Clara, California
95055
(408) 248-BUTLER (2885)

Northern/East Bay Area
(San Francisco/Oakland)
(510)83-BUTLER(28853)

* * *

[12] Q. Okay. The auditory of the CAD, what is that? One other thing. I know the answer to a lot of my questions, but for purposes of the record, you know, I have to ask sometimes very obvious questions.

A. Okay. The CD that has the recorded radio traffic.

Q. And was that radio traffic pertaining to this incident with Ms. Sheehan?

A. Yes.

Q. Okay. And by the way, do you understand that when I refer to this incident or the subject incident that I'm referring to the August 7th, 2008 incident that resulted in the shooting of Ms. Sheehan?

A. Yes.

* * *

[14] Q. Right. Okay. Now, as I understand it, you responded to a call pertaining to 1941 15th Street on August 7th, 2008; is that correct?

A. Yes.

Q. Okay. And about what time did you receive that call?

A. I would have to refresh to get what time.

Q. Do you recall whether it was in the morning, the afternoon?

A. It was about lunchtime.

Q. Okay. And how did you receive the call?

A. I saw it on the computer screen as a pending run.

Q. At the time you received the call, were you familiar with the address of 1941 15th Street?

A. Meaning what?

Q. Meaning did you know, like, the house or – or the property that was located there?

A. No.

[15] Q. Okay. Had you ever responded to that address previously?

A. Not that I know of.

Q. Okay. Had you ever heard of Conard House?

A. No.

Q. Were you aware that there was a facility at that location that was essentially residential housing for mentally disabled people?

A. When I got the call on the computer, no.

Q. Okay. And can you summarize the call that you got on the computer?

A. I know it was meeting with a social worker, but for the specifics, I'd have to refer to the printout.

Q. Okay. And by the way, the printout, that's something called a CAD; is that correct?

A. Correct.

Q. Previously marked as Exhibit A to the deposition of Officer Balinton, if you can take a look at Exhibit A to Officer Balinton's deposition.

MR. LOEBS: I think it's Balinton.

MR. NISENBAUM: Oh, I'm sorry. Balinton.

THE WITNESS: Okay.

BY MR. NISENBAUM:

Q. Does reviewing the first page of Exhibit A [16] refresh your recollection as to the call that you reviewed over your computer?

A. Um, yes.

Q. Okay. Now, there's an entry that's at, let's see, 1011. There's an entry – well, there's a column on the left-hand side where it looks like there's been a cutout, like a hole punch cutout of a numeral or two numerals. But the following entries below that column are – begin with 11:10:11. Do you know what that column is? And this is on Exhibit A.

A. Right. Well, I can read it as – for what I understand it to be, but I don't remember that being on there.

Q. Okay.

A. At the time I didn't – I don't have a memory of that.

Q. That's fine. Let me ask you this. Are you familiar with CAD records?

A. Yes.

Q. What are CAD records?

A. CAD records is – it's a – it's when the call taker initially typed into the computer what the call is to send it up to the dispatcher.

Q. Right.

A. And then it's in the computer until an officer [17] takes it, and then they send that to your computer terminal. And it's a record of when the dispatcher, or the call taker as it were, enters whatever's going on into the computer.

Q. Okay. And the column that's the left-hand column that has digits, is that a – are those time stamps, if you know?

A. Those are time stamps for when the dispatcher or the call taker entered it into the computer, not necessarily as it happened.

Q. Right. Not necessary as the call happened, but –

A. As they hit whichever – I've never been a dispatcher. But as they write into the computer and

they send it. You'd have to ask one of them exactly how they send it or whatever.

Q. Okay. But to your knowledge those – the time stamps reflect when the entry was made not necessarily when the offense [sic] reflected in the entry occurred; is that correct?

A. Correct.

Q. Okay. Now, you've talked about this computer. I take it this is a computer that's in your police vehicle?

A. Yes.

* * *

[18] [Q.] Exhibit A is a CAD record pertaining to the incident with Ms. Sheehan, correct?

A. It appears to be, yes.

Q. Okay. Now, does looking a[t] Exhibit A refresh your recollection of the call that you reviewed over your computer pertaining to this incident?

A. I remember that it had some of this information in there. All of this was not in there.

Q. Okay.

A. Because when I got it, most of this would not have happened yet.

Q. Right. Well, what was the first entry that you recall seeing? And if there's a time stamp that you can use, that would be helpful too.

A. Well, I don't remember this. I'm not trying to – I don't remember this specifically. I just remember it was a call to meet with the social worker regarding his client. And she had threatened him and he wanted assistance with a 5150.

* * *

[29] Q. Okay. And – and so it was your sense from hearing the call that the person to be 5150ed you thought would possibly fit under the category danger to others, correct?

A. Yes.

Q. And what was the basis of that belief at that time?

A. I thought that it might be possible because the nature of the call had said that she had made threats and had said something about stabbing him.

Q. Okay. Now, do you have any particular training with respect to responding to 5150 subjects?

A. Yes.

Q. Okay. Can you summarize the training you've had in that regard?

A. The – there's a training in the academy that everybody goes through. And then I went to an additional training out of the Presidio. I don't remember what it was called though.

Q. Do you recall when you attended the training at the Presidio approximately?

A. I know it was before this incident happened, [30] but I don't –

Q. Do you have a sense of whether it was the year before, months before?

A. I don't remember.

Q. Okay. And do you recall whether or not the training that you had at the Presidio addressed mentally – mentally disabled subjects?

A. Yes, it did.

* * *

[Q.] Apart from the training you had at the Presidio, do you recall any other training with respect to responding to 5150 subjects that you received after graduating from the academy?

A. Not off the top of my head, no.

Q. Okay. Have you had training with respect to [31] the Americans with Disabilities Act?

A. Yes.

MR. LOEBS: Objection. Vague.

BY MR. NISENBAUM:

Q. Do you understand the question?

A. I know that it exists.

Q. Okay. You know the Americans with Disabilities Act exists, correct?

A. Yes.

Q. And you've had some training with respect to the Americans with Disabilities Act through City and County of San Francisco Police Department; is that correct?

A. Yes.

* * *

[35] Q. Let me ask you this, is there any category of – have you been trained that while on patrol you're – you're required to comply with the Americans with Disabilities Act?

[36] MR. LOEBS: Object. The question is vague and ambiguous and calls for a legal conclusion and overbroad.

THE WITNESS: If you're asking that when we respond to calls and they involve people who may be covered by the American Disabilities Act, then that is something that we have to take into consideration. But if that's not what you're asking, I don't understand the question.

BY MR. NISENBAUM:

Q. Okay. Is it your understanding that when you respond to a call as a police officer and the call pertains to a person who may be covered by the Americans with Disabilities Act, you must take into consideration the Americans with Disabilities Act?

MR. LOEBS: Object to the question as being vague, ambiguous, incomplete hypothetical, calls for a legal conclusion and it's overbroad.

THE WITNESS: As police officers we have to do – make decisions that are within the given laws. And if one of those given laws has to do with the American Disabilities Act, then that would be something that we would use, just like we would use a Penal Code or a Vehicle Code, et cetera. But that would be one of the guidances that we would follow in conjunction with [37] others.

BY MR. NISENBAUM:

Q. Do you have an understanding that people who suffer from mental disabilities may be covered by the Americans with Disability Act?

MR. LOEBS: Objection. Vague and ambiguous. Overly broad. Calls for a legal conclusion.

THE WITNESS: If what you're asking is that American Disabilities Act covers things other than just physical impairments, like blindness or deafness or wheelchair bound, et cetera, then it also might cover depending on severity or not severity, I'm not sure exactly what the boundaries are on that, people who have mental disabilities, then I've been trained that some people who have emotional or mental disabilities are covered. But if that's not what you're asking, I don't know what you're asking.

BY MR. NISENBAUM:

Q. Now, have you been trained with respect to responding to mentally ill subjects?

MR. LOEBS: Objection. Vague. Incomplete hypothetical.

BY MR. NISENBAUM:

Q. Do you understand the question?

A. Are we trained to respond to calls for people [38] with mental disabilities?

Q. Yes.

A. Among other things.

Q. Is that, yes, among other things?

A. Yes, among other things.

* * *

[39] Q. Okay. And have you received training in how to respond to subjects who are, are subjects of a 5150 who appear to exhibit a mental illness?

A. We have been trained with guidance as to what may be more effective, but every situation is different. And that's also part of the training.

* * *

[42] Q. Under what circumstances have you been trained that a person's mental illness, mental impairment or mental disability is relevant to a call?

MR. LOEBS: Objection. Vague. Compound. Overly broad. Calls for a narrative.

THE WITNESS: There's no, like, one specific instance. That's what – there's so many different calls we go to that not all of them have to do with the mental disability.

BY MR. NISENBAUM:

Q. Okay. Is it fair to say that 5150 calls typically do have to do with a mental disability?

A. Typically, yes.

Q. Okay. And ultimately when you spoke to Mr. Hodge, you were – you were – you were then – you [43] then knew for certain that the call was about a 5150, correct?

A. A possible 5150, yes.

Q. Right. And you also knew that the call was about a person who was suffering from – about a subject who was suffering from a psychiatric disability, correct?

A. Yes.

Q. And did you have an understanding of what that psychiatric disability was?

A. I believe he said that she had schizophrenia.

* * *

[46] Q. Okay. So did Mr. Hodge tell you at any point in time – well, strike that.

At some point you entered 1941 15th Street, correct?

A. Yes.

Q. Before you entered that residence, or that [47] building, did Mr. Hodge tell you that Ms. – that the subject who we later – who you later learned was Teresa Sheehan was off her medication?

A. Yes.

Q. And was that – and did you understand that it was psychiatric medication?

A. Yes.

Q. And did Mr. Hodge indicate that that was one factor in why he wanted to 5150 her?

A. He didn't say that directly. He communicated that she had been off her medication.

Q. Right.

A. But not everybody who's off their medication fits the criteria for 5150.

Q. Right. Did he make a connection between her being off the – her medication and his desire to 5151 her – to 5150 her?

MR. LOEBS: Objection. Vague and ambiguous as to what you mean by make a connection.

THE WITNESS: I don't know if there was a connection or not.

BY MR. NISENBAUM:

Q. Okay. Did Mr. Hodge ever indicate to you in any way that Ms. Sheehan was a danger to herself?

A. He never used the words. He never said that [48] she had a history of suicide, but I didn't ask.

Q. But did he ever indicate to you that Ms. Sheehan was suicidal?

A. Not that I remember.

* * *

[53] Q. Okay. What facts – what – what had you been told by Mr. Hodge up to the point in time that you entered 1941 15th Street?

MR. LOEBS: You mean before?

MR. NISENBAUM: Up to the point in time when she entered the building.

MR. LOEBS: Do you mean that before? Is that what you mean? What had she been told by Hodge before she entered 1941 15th Street?

MR. NISENBAUM: Sure. Sure. That's fine.

[54] THE WITNESS: Okay. So before we enter the residence, the conversation with Mr. Hodge.

MR. LOEBS: He said you.

THE WITNESS: He told me –

MR. LOEBS: Okay. I'm sorry. I didn't mean – she said we. So I want to make sure you're talking about her.

MR. NISENBAUM: I was talking about her.

THE WITNESS: The conversation with me was that – none of this is exact – that he had gone to the house to check on the resident. That some of the residents had told him that Ms. Sheehan – they had offered her food and that she had stated that she no longer ate anymore, and that she had been in the same clothing without changing for, I don't remember the amount of time. It was like a week roughly, maybe two weeks. I don't remember.

And she had been off of her medication for about a year and a half. That she'd been in a downward psychotic spiral, especially during the last couple of months. That he had gone in to check on her, and that she had threatened to stab him with a knife, but that he had not seen a knife.

* * *

[55] Q. Okay. Now, if I understand correctly, you had been told that Mr. – strike that.

Mr. Hodge told you that he had the authority to effect a 5150 on his own, correct?

A. Correct.

Q. Okay. And Mr. Hodge told you that he was simply calling you to assist him in effecting the 5150, correct?

A. He said much more than that actually.

Q. Okay. Well, what else did he say in that [56] regard?

A. He said that he wanted to 5150 her, and he was afraid that she was going to hurt him or the other residents, and he wanted us there to possibly place her in handcuffs if they were needed so that she didn't harm somebody on the way to the hospital.

Q. Okay. Did he say that she had – that she had harmed anyone up to that point in time?

A. No.

Q. Okay. And in terms of threats, the only threat that had been made was against Mr. Hodge, correct?

MR. LOEBS: Objection. Calls for speculation.

BY MR. NISENBAUM:

Q. Based upon what Mr. Hodge told you?

A. Yes.

Q. Okay. And that threat – to your knowledge, what was the totality of your information as we sit here today? What do you recall exactly the threat was against Mr. Hodge?

A. That she had threatened to stab him.

Q. Okay. And do you recall whether or not it was a conditional threat, that is, for example, get out of my room or else I will stab you?

MR. LOEBS: Objection. Asked and answered.

[57] THE WITNESS: I don't remember anymore.

BY MR. NISENBAUM:

Q. Okay. Could it have been a conditional threat such as that?

MR. LOEBS: Objection. Calls for speculation.

THE WITNESS: Yeah. All I can say is I don't remember anymore.

BY MR. NISENBAUM:

Q. Okay. Do you know – and again, I just want to be clear so that – so that the record is clear. As we sit here today, do you know that – that it was not a conditional threat, that it was a straight up I will stab you?

MR. LOEBS: Objection. Vague and ambiguous. False dilemma. Calls for speculation and argumentative.

THE WITNESS: I don't remember.

* * *

[58] Q. Okay. Mr. Hodge showed you some type of card, correct?

A. Yes.

Q. And what type of card did he show you?

A. It was a little pink card issued by Public Health. San Francisco – I don't remember the name of the – the board. Mental Health Board or something like that.

Q. Okay. And what did the – and had you ever seen a card like that before?

A. I didn't remember ever seeing a card like that before.

Q. Did – did Mr. Hodge – well, as I understand it, you had questions about whether or not Mr. Hodge actually had the authority to do this 5150, correct?

A. Yes.

Q. Okay. And in order to resolve those questions you contacted your – your street sergeant, correct?

A. Yes.

[59] Q. And your street sergeant at that time was Kimberly Reynolds?

A. Yes.

* * *

[67] Q. Okay. So what was the purpose of calling Sergeant Reynolds?

A. To clarify my duties as related to this incident.

Q. And what needed clarification?

A. Whether or not I could accept his application. If I needed to make my own application. I didn't believe that just because he had that card I could just take his word for it. So I just needed to make sure that what I was doing was within my general orders.

* * *

[71] Q. Okay. Well, how did – at some point in time did you go to Ms. Sheehan's unit inside 1941 15th Street?

A. Yes.

Q. How did you get there?

A. He directed us to it.

Q. Okay. How did he direct you?

A. Again, I don't remember the exact wordage, but something to the extent of her room's at the end of the hall, and I'd ask which one. There's a couple of doors here. He said the one straight ahead right at the end of the hall, and there was one door that was straight ahead.

Q. Okay. And so there was a – so you associated a single door with Ms. Sheehan's unit; is that correct?

A. Yes.

* * *

[74] Q. Okay. And during that time, up to the point when Sergeant Reynolds arrives at the location where you and Mr. Hodge were at, had you heard any sounds from inside 1941 15th Street?

A. Not that I remember, no.

Q. Okay. I take it – well, how were you [75] dressed?

A. In uniform.

Q. Full police uniform?

A. Yes.

Q. Including a badge and a gun?

A. A star and a gun, yes.

Q. Where was the star displayed?

A. On my chest.

* * *

[105] Q. Okay. In this case with Ms. Sheehan, you forced open her door, correct?

A. Yes.

Q. You had no warrant, correct?

A. Correct.

Q. Upon what basis did you decide to force open her door?

A. Well, there were a couple of reasons. One is to effect an arrest. She's committed multiple felonies,

some in our presence, some not. She is a danger to other people. I don't know whether she can escape into [106] the community. So escape is another reason.

Destruction of evidence. She could possibly be getting rid of the knife that she had. We have a responsibility to look in there and see and verify that there is in fact no other person in there that is being injured or harmed. As well as Ms. Sheehan that she would not be harming herself.

Q. Anything else?

A. Not off the top of my head.

* * *

[139] Q. Okay. How did the door open the first time?

A. Okay. Going back to the first time. Sergeant Reynolds used the key and opened the door.

Q. Oh, that's right. So up to the point in time with the door being opened the first time, what communication – what had you said to Teresa Sheehan?

[140] A. And actually I just released that when I said something to her, it was just after the door opened the first time, not just before.

Q. Okay. And what was that?

A. Sergeant Reynolds was saying most of the talking before the door opened. She opened the door

to look in. She continued talking. Ms. Sheehan had jumped up. After she grabbed the knife, that's when I started speaking, and I was telling her to drop the knife. I don't remember exactly what my words were, but something to the extent of –

Q. So your first –

A. – drop the knife.

Q. The first statements you made that were directed at Teresa Sheehan were drop the knife, correct?

A. I think so.

* * *

[144] Q. Okay. When Sergeant Reynolds opened the door, what was your first observation of Ms. Sheehan?

A. Getting up from her bed. She was lying with her head towards us, her feet away from us.

Q. And when you first saw Ms. Sheehan, was she actually on the bed?

A. I think she was, like I said, she was getting up from the bed. So I don't know if she was – what position exactly she was in, but she was getting up from [145] the bed.

Q. Okay. Do you recall Sergeant Reynolds knocking on Ms. Sheehan's door before she opened it?

A. Yes.

Q. And did she say it's the police?

A. I don't know what her exact words were, but I know she said something to the extent of it's the police department. We need to talk to you. We're here to help, but I don't remember exactly. It's not a quote.

Q. Okay. And was there any response to that that you could hear?

A. I did not hear anything.

* * *

[146] Q. Okay. So what happened – we covered the very first part of this. But what happened once Sergeant Reynolds opened the door?

A. She was saying –

Q. She being?

A. Oh, sorry. Yes. Excuse me. Sergeant Reynolds was saying police department. We're here to help you. We need to talk to you. What's going on today. Again to the extent, I don't know exactly what it was. I know at least that first point – part of it. And I saw Ms. Sheehan getting up off of the bed. At which point she started yelling.

Q. Ms. Sheehan started yelling?

A. Yes.

Q. What was Ms. Sheehan yelling?

A. Again, I don't remember exactly what the words were anymore, but I remember it was, you

don't have a search warrant. I already made a police report about this. I know she said, I'll kill you, and right about that time was when she was grabbing a knife. There were, I think, a couple more things she said, but I can't really remember what they are anymore.

Q. Did she say get out of my room?

A. She may have said that.

[147] Q. Okay. And after she said that, did Sergeant Reynolds respond to that?

MR. LOEBS: Objection. Vague.

BY MR. NISENBAUM:

Q. After she said – after – well, Ms. Sheehan at the time, I think you said she was getting up off the bed when you – when you first saw her in the room; is that right?

A. She appeared to be, yes.

Q. Okay. And was that at that time as she was getting up off the bed that she was making statements along the lines of, I'm going to kill you. You don't have a search warrant. I've already made a police report for this; is that right?

A. Yes. It was as she was getting up off the bed walking towards us and grabbing the knife.

Q. And during that time, was Sergeant Reynolds responding to Ms. Sheehan verbally?

A. Yes.

Q. And what was Sergeant Reynolds saying?

A. I didn't really listen as much now because we were both – as we saw her grabbing the knife, we were both saying things to the extent of drop the knife. Please drop the knife. But I don't remember exactly what she said, what I said.

[148] Q. Okay. When Ms. Sheehan got up off the bed, was she initially facing away from you as she was getting up off the bed?

A. As she was getting up, she was getting up like sideways from the bed. Perpendicular to how the bed was laying.

Q. Did that put – did that put her back towards – towards you or not?

A. No. That put her back towards the eastern wall. So her side, her right side would have been towards us.

Q. And as I understand it, there was a pedestal table that had two knives on it; is that correct?

A. Um, there was what I believed at the time to be a pedestal table, but I've reviewed photos afterwards that show that it was not a table. It was not accurate.

Q. Okay. So what was it?

A. I think it was boxes or something.

Q. I see. And how many knives were on it?

A. One to – two to three. I know there was more than one. I don't believe there was more than three, so.

Q. Okay. And were they different sizes or all the same size?

A. They're all in the larger knife family, but [149] not like a – I'm not saying this as a joke. Not like a Crocodile Dundee knife. Something you would still find in a kitchen, but not necessarily a steak knife. So I'd say larger than a steak knife, but still a knife that would be found in your kitchen.

* * *

[150] Q. Okay. But she did grab a knife and threaten you with it, correct?

A. Yes, she did.

Q. Okay. And how did she threaten you?

MR. LOEBS: Objection. Vague as to time.

BY MR. NISENBAUM:

Q. When she grabbed the knife.

A. Right after she grabbed the knife, she raised it above her head coming towards Sergeant Reynolds and me saying I'm going to kill you.

Q. Okay. And how was she holding the knife?

A. Up above her head, up above like this. Arm, I guess, about at roughly a – is that a 35-degree angle.

Q. With the elbow about as high –

A. I'm not sure if it's out or forward. It was just up. The knife would be right around top of her head range.

Q. Okay. And you have your elbow kind of at shoulder height. Is that consistent with how she was holding it?

A. Yeah. It was roughly around there. Give or take an inch, couple inches on either side.

* * *

[152] Q. Now, was there a motion that she was making with that knife hand?

MR. LOEBS: Objection. Vague as to time.

BY MR. NISENBAUM:

Q. When she picked it up.

A. Right as she picked it up and brought it over her head and said I'm going the [sic] kill you, I don't remember her making jabbing motions or anything.

* * *

[154] Q. Okay. And how was she moving in your direction, in what manner?

A. She was walking forward.

Q. Okay. Walking as opposed to running?

A. Yes.

Q. And she wasn't lunging towards you, was she?

A. No.

Q. Okay. And once she began moving in your direction, what happened next, with the knife, I mean – strike that.

Once she began moving in your direction with the knife, what happened next?

A. I assume you're still talking about when the door's only been opened once?

Q. Correct.

A. Well, she was saying, as we've already talked, I'm going to kill you, and all those other things. The door was closed.

Q. Was the door closed with you inside the room or outside the room?

A. I was outside the room.

* * *

[168] Q. Okay. Now, you also indicated that somehow she might pose a threat to – to other people, right?

A. Yes.

Q. Okay. So who did she pose a threat to in her room, while she was in her room?

A. Well, we didn't know if she was in her room – which point are you talking?

Q. By the time – let's talk now after you – after the door is closed.

A. Okay.

Q. Right. After the door had been opened once and then closed. So from the point in time when it's closed, did you have information that she posed a threat to others in her room?

A. Well, we didn't know whether there were others in her room.

Q. Did you have any reason to believe that there were other people in her room?

A. We have to assume that there are others that [169] might be in harm's way until we know for sure that they are not.

Q. Well, the social worker didn't tell you there was anybody else in her room, correct?

A. Correct.

Q. And when you opened – when the door was opened and then closed in that period of time, you didn't see anyone else in her room, correct?

A. Correct.

Q. And you didn't take any other steps to find out if there was anyone else in her room, correct?

MR. LOEBS: Objection. Vague and ambiguous as to what you mean by any other steps.

BY MR. NISENBAUM:

Q. Well, did you call out – I'll rephrase the question.

Did you yell out is there anyone else in there?

A. No.

Q. Okay. Did you ask the social worker after, now the door is closed, did you ask Mr. Hodge whether or not there was anyone else in there?

A. No.

* * *

[172] Q. All right. After the door closed, this would be, I guess, after you initially – after Sergeant Reynolds opened the door with the key and then the door closed, did you make a radio dispatch call?

A. Yes.

Q. And in that radio dispatch call, did you tell dispatch that you had a barricaded suspect with a knife?

A. No.

Q. Did you ever use the term barricaded suspect?

A. No.

Q. Do you know if Sergeant Reynolds used that term barricaded subject or barricaded suspect?

A. Yes.

Q. Okay. Yes, she did?

A. Yes, she did.

* * *

[177] Q. Okay. Now, after the door was closed – well, the call for backup that was made, was that – was that made before or after the door was closed?

A. I think it was after.

Q. Okay. And was there some – did you have some indication that backup was on its way to the scene?

A. Actually, at first there was no backup coming. It was dispatched wrong.

Q. Right. But at some point you did know backup was coming, correct?

A. Well, I didn't really listen once they got the correct location back on.

Q. Okay.

A. Once they got the correct location back on, I was more focused towards Ms. Sheehan's door again. It was hard to hear.

* * *

[180] Q. Okay. Now, you indicated that this was a nonverbalized plan; is that right?

A. Yes.

Q. Okay. By nonverbalized you mean an unspoken plan?

A. Right. From common training.

Q. Okay. So based upon your training, it was your intention now to open – to – after this woman, Ms. Sheehan, had moved towards you with a knife saying that she was going to kill you – strike that. Strike that.

After this woman, Ms. Sheehan, moved towards you with a knife saying she was going to kill you and then the door closed, it was now your intention to get the door open; is that correct?

A. That was one of the goals.

Q. Now, you understood the door to be a barrier between Ms. Sheehan and you, correct?

A. Between her physical person and us, yes.

Q. Right. And did you have some sense that the knife was – with the door closed that the knife could harm you?

A. Yes.

Q. With the door closed?

A. Yes.

[181] Q. And how would it harm you with the door closed?

A. Because most interior doors are hollow core doors and knives can go through them.

Q. So were you leaning up against the door?

A. When I was trying to get the door open, yes. I was hitting it with my shoulder.

Q. Okay. Okay. Well, that's when you were trying to remove the barrier between you and Ms. Sheehan, correct?

A. Correct.

Q. Okay. But with the barrier in place, assuming you don't lean up against the barrier, how would the knife be a threat to you?

MR. LOEBS: Objection. Vague and ambiguous as to what you mean by that knife. The person with the knife? You mean just the disembodied knife?

BY MR. NISENBAUM:

Q. How would the weapon that you saw Ms. Sheehan possess be a threat to you?

A. With the door closed?

Q. Right. Assuming you're not leaning up against the door.

A. Okay. Because if we were not attempting to get the door open again, we don't know what [182] Ms. Sheehan's doing. She could be planing [sic] to come out that door and surprise us and stab us as

we're standing there. She could be doing any number of things.

Q. So in order for Ms. Sheehan to come through the door and stab you with the knife, Ms. Sheehan would have to remove the barrier that the door posed, correct?

MR. LOEBS: Objection. Vague and ambiguous as to what you mean by remove the barrier that the door posed.

THE WITNESS: Can you restate question, please.

BY MR. NISENBAUM:

Q. Okay. So the door is a barrier between you and Ms. Sheehan, correct, when it's closed?

A. To a certain extent, yes.

Q. Well, to the extent that it's a physical object in between the two of you and a complete physical object between the two of you, correct?

MR. LOEBS: Objection. Vague and ambiguous as to what you mean by a complete physical object.

THE WITNESS: Doors can be broken.

* * *

[185] Q. Okay. And the door wasn't budging, correct?

A. Correct.

Q. So was this a pretty solid door?

A. I don't know.

Q. Okay. In any event, Ms. – I'm sorry. Sergeant Reynolds wasn't able to move the door in any way, correct?

A. I don't believe so, no.

Q. You're bigger than Sergeant Reynolds, correct?

A. Yes.

Q. Okay. Now, at the time, did you fear that the knife was going to come plunging through the door, the knife blade?

MR. LOEBS: Objection. Vague and ambiguous as to time.

BY MR. NISENBAUM:

Q. At any time. At any time.

A. I felt that it could be a possibility.

Q. Okay. Well, you volunteered to try and get the door opened, correct?

A. Yes.

[186] Q. And the way that you tried to get the door open was by shoving your shoulder against it, correct?

A. Not initially, but then, yes.

Q. Okay. Well, first you were trying to kick it open?

A. Correct.

Q. And then ultimately you used your shoulder shouldering the door in the manner you described, correct?

A. Yes.

Q. Right or left shoulder?

A. Left.

Q. Okay. And at that time you did that, were you afraid that the knife was going to stab you when you put your body in contact with the door?

MR. LOEBS: Objection. You mean the knife that Sheehan had?

BY MR. NISENBAUM:

Q. Yeah. The knife that may have gone through the door.

A. I thought it was possible that Ms. Sheehan could stab me with the knife through the door.

Q. Okay. Now, how many times did you hit the door with your shoulders before it opened?

A. I'm not sure.

[187] Q. Do you have an estimate?

A. Not really. I'd say four to six, but I don't really remember well.

Q. Okay. And when the door opened, do you know whether or not the door opened as a consequence of your shoulder hitting it as opposed to Ms. Sheehan opening it from the inside?

A. I don't know.

Q. Okay. Once you hit – once the door did open, what happened next?

A. I saw Ms. Sheehan. She was about 8 feet away from me. That's a – five to eight. I don't know. She was I'd say around the foot of the bed, but a little over to the right.

Q. Okay. She was on her feet?

A. Yes.

Q. Okay. The knife was still in her hand, correct?

A. Yes.

Q. Right hand or left hand?

A. I believe it was in her right hand at this point.

Q. In what position?

A. Down by her thigh.

Q. Okay. And was the blade pointed in any [188] direction if you could tell?

A. It would be pointed towards the front of her body.

Q. Okay.

A. Kind of downish.

Q. And then what happened?

A. She was – during – I looked up and I saw that she was – she had been turned away from me somewhat. She was turning back towards me at the door, and then she started coming back at me again.

Q. She came back at you again. How did she do that?

A. She began walking towards me again.

Q. Walking or running?

A. Walking.

Q. Okay. And then?

A. She was saying something, I believe it was I'm going to kill you again, among other things. But I don't remember what. She – I saw – I stepped back. I can't see Sergeant Reynolds. I didn't contact her. So I assume she also stepped back. And I saw pepper spray coming past me.

Q. Okay. And then what happened?

A. I waited a couple of seconds to see if the pepper spray was going to work. And in those couple of [189] seconds she had now come up to the doorway,

breached the doorway, turned towards me with the knife in her hand saying I'm going to kill you. And she started to take a step towards me.

Q. And then?

A. I discharged my firearm.

Q. In what direction?

A. Towards Ms. Sheehan.

Q. Any part of her body in particular?

A. I was – I had my hand down by my right hip. So I was aiming for center mass as best I could with my gun down by my waistline.

Q. Okay. How many times did you discharge your weapon?

A. I believe I fired two to three times.

Q. Okay. What was Ms. Sheehan's position, body positioning the last time you fired it?

A. She was I'd say two or three feet from me. I was facing directly towards her. She was – I don't know that her whole body was turned towards me, but at least her upper body was turned towards me. She had her hand up with the knife in it. And – but she was still like by her doorway.

Q. Okay. And was the knife side of her body, was that the side that was turned towards you?

[190] A. It was – I was – I would have been off to her right, and she had the knife in her left hand. So she had turned towards her right towards me with the knife hand being on that side turned towards me.

Q. And the knife hand was still raised in the air?

A. Yes.

Q. Okay. And how about Sergeant Reynolds? Did she shoot also?

A. Yes.

Q. Okay. How many times did she shoot?

A. I believe she fired two to three times.

Q. Okay. And were you able to tell what Ms. Sheehan's body positioning was the first time Sergeant Reynolds shot?

A. She had – after I discharged my round, she kind of paused, and then she had turned towards Sergeant Reynolds and started again, I think to take a step towards Sergeant Reynolds when she began to discharge her firearm.

Q. So by the time you discharged the last round that you fired, Sergeant Reynolds, based upon what you saw, heard and observed, fired the first shot that she fired; is that right?

A. I'm sorry. I don't understand.

[191] Q. Okay. When Sergeant Reynolds fired the first shot, had you already fired the last shot that you fired?

A. Um, I think so.

Q. Okay. And how many – and you say Sergeant Reynolds fired three shots?

MR. LOEBS: Objection. Misstates her testimony.

BY MR. NISENBAUM:

Q. How many shots was it?

A. I think it was two to three.

Q. Two to three. Okay. And so the first shot Ms. Sheehan was on her feet; is that right?

A. I believe so, yes.

Q. Okay. And where was Ms. Sheehan, in what position, when the second shot was fired?

MR. LOEBS: Objection. I believe she said two to three, and it's argumentative for you to pick a number and stick with it. That's not her testimony that there were exactly two or three.

MR. NISENBAUM: Well, there was at least a second shot though.

MR. LOEBS: There was a last shot. She says two to three.

MR. NISENBAUM: Well, fair enough.

[192] Q. The next shot that you recall, where was Sergeant Reynolds? I'm sorry. Where was Ms. Sheehan? In what position?

A. I think the first two seconds, I'm not sure if it's one or two, she was standing in that same way, still coming forward.

Q. Right.

A. For the third one, I believe Ms. Sheehan was on the ground.

Q. Okay. And you saw Ms. Sheehan on the ground when the last shot Sergeant Reynolds fired at her was fired, correct?

A. I believe that's where she was, yes.

Q. Okay. And in what position on the ground was Ms. Sheehan?

A. I'm not real clear as to exactly what position she was in. I turned and looked down and I saw her down there and heard the shot. But I didn't see an impact of a bullet. So I don't know exactly where she was down there when it –

Q. You're saying down there. I need that described for the record.

A. Towards the ground. I don't know exactly what her positioning was.

* * *

[198] Q. Okay. So of course – well, strike that.

In terms of escape, by the way, how would Ms. Sheehan escape from the room – or strike that.

Was escape a concern?

A. Yes.

Q. Okay. So how was she going to escape from the room?

A. The whole back of her room had windows.

Q. Right.

A. I think it was bay windows. And I felt that that was a possibility for escape.

Q. And what floor was this on?

A. Like I said, you enter on the second floor.

Q. So this – Ms. Sheehan's room was on the second floor of this building?

A. Right. But the floor that you enter on.

Q. Okay. Do you know if officers were covering the back?

A. At that point I did not know.

Q. Did you know that officers had been sent to cover the back?

A. Yeah. I had asked the officers to go to the back.

Q. Okay. So you would expect at that point in time for officers to have the perimeter secure; is that [199] right?

A. No.

Q. Okay. Did you force entry into Ms. Sheehan's room knowing that the – that the perimeter had not been secured?

A. I did not know whether or not it had been secured at that point.

Q. Did you take any steps to confirm that it was secure?

A. No.

Q. So what did you gain from forcing entry?

MR. LOEBS: Objection. Vague.

BY MR. NISENBAUM:

Q. What tactical advantage over Ms. Sheehan did you gain from forcing entry into her room.

A. I now have the advantage of knowing whether she's fleeing, she's changing or not changing weapons. I don't know if she has guns, doesn't have guns. She's waiting in ambush. She's harming herself or someone else. Like I said, any other of the other things that I'd mentioned previously.

Q. Did you say she was waiting in ambush?

A. Well, you asked me what tactical advantage –

Q. Right.

A. – by having the door opened.

[200] Q. Right. And you referenced possibly she could be waiting in ambush; is that right?

A. Right.

Q. And the ambush would be for an officer to open the door?

A. Or from the window or wherever.

Q. That she would do what from the window? An officer entering from the window, she would ambush them?

A. Possibly.

Q. And also she might jump out the window?

A. Yes.

Q. Onto a full story below?

A. I don't know what is in the backyard. I don't know what's beyond those windows. I just know there's windows there. I don't know if there's a fire escape. I don't know if there's a hill graded up so it wouldn't be a full story. I have no idea. I really didn't look beyond the windows.

* * *

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE
NORTHERN DISTRICT OF CALIFORNIA

– – o0o – –

TERESA SHEEHAN, Plaintiff, vs. CITY AND COUNTY OF SAN FRANCISCO, et al. Defendants.	)	No.: C09-03889 CRB

DEPOSITION OF SERGEANT KIMBERLY REYNOLDS

TUESDAY, NOVEMBER 9, 2010

REPORTED BY:
KELLY L. McKISSACK, CSR No. 13430

[LOGO] ***Barbara J. Butler & Associates***
CERTIFIED COURT REPORTERS

Peninsula/San Jose/
Southern Counties
1659 Scott Blvd., #15 –
P.O. Box 3508
Santa Clara, California
95055
(408) 248-BUTLER (2885)

Northern/East Bay Area
(San Francisco/Oakland)
(510)83-BUTLER(28853)

* * *

[34] Q. Okay. So looking at Bates stamp 1213 of Exhibit A. It is headed, "SFPD Roll Call Training Lesson." Do you see that?

A. Yes.

Q. Okay. And is that correct?

A. Is what correct?

Q. That it says, "Roll Call Training Lesson"?

A. Yes.

Q. And it says, "Subject: Americans with Disabilities Act and Law Enforcement Part 1." Correct?

A. That's correct.

* * *

[37] Q. Well, have you been trained that there are some people who have psychiatric or psychological mental types of disabilities?

A. Yes, I have.

Q. Okay. And have you been trained that some people with mental disabilities may – may exhibit threatening or violent behavior that is caused by that mental disability?

MR. LOEBS: Objection. Vague. Incomplete hypothetical.

THE WITNESS: Yes. I'm aware that people with psychiatric issues can become violate [sic]. I'm aware of that. I've been trained in that, yes.

BY MR. NISENBAUM:

Q. And are you aware that – that those people with psychiatric issues may be protected under the Americans with Disabilities Act?

MR. LOEBS: Objection. Vague. Ambiguous as [38] to what you mean by protected. Also calls for a legal conclusion.

THE WITNESS: I don't legally know what all of their protections are, but if I may explain it. You can't put it into a box and have it fit every scenario. So I'm sure they have protections and rights, yes. I'm aware of that. Specifically what they all are, I couldn't give you a legal answer on that.

BY MR. NISENBAUM:

Q. Okay. Are you trained to consider a person's disabilities in relation to the – the actions that you take with respect to that person as a police officer?

MR. LOEBS: Object to the question as being vague. Incomplete hypothetical.

THE WITNESS: It would depend on the situation, but, yes.

* * *

[40] Q. Okay. With respect to responding to a person who is exhibiting threatening behavior where

you have information that the reason the person is exhibiting that behavior is due to a mental disability or impairment or mental illness, how does that factor into your response as a law enforcement officer?

MR. LOEBS: Object to the question as being grossly incomplete hypothetical. Vague and ambiguous.

THE WITNESS: It factors in as being a [41] consideration that I take. However, situations are so – they vary so differently, and there's so many different levels of violence and threat that it definitely is a consideration. But it doesn't specifically lock me into a specific behavior, I guess, is the best I can answer that.

BY MR. NISENBAUM:

Q. Okay. So are you – have you been trained that people with mental disabilities or a psychiatric – strike that.

Have you been trained that people with a psychiatric disability may respond to – may respond – strike the question.

Have you been trained that – that people with a psychiatric disability may respond inappropriately in a manner that is unexpected to – to your presence as a police officer?

MR. LOEBS: Objection. Vague. Incomplete hypothetical. Compound.

THE WITNESS: And you said, just so I'm clear on the word, inappropriately.

BY MR. NISENBAUM:

Q. In an unexpected –

A. Unexpected, inappropriately?

Q. Right.

[42] A. Yes. I've been trained that mentally ill people can be volatile, inappropriate and unpredictable, yes.

Q. Okay. Have you been trained with respect to – to avoid provoking a violent response by a – by a person who has a psychiatric disability?

MR. LOEBS: Object to the question as being vague as to the use of the term provoking. Vague as to violent response. Vague as to disability and incomplete hypothetical.

THE WITNESS: So the position I'm in is I have a job to do. If my present [sic] is provoking – my presence is provoking, there's – I still have to – to accomplish my job. So it's a consideration, like I said. There's training in this information that we are provided, tools and thoughts to take into consideration, but not to limit our abilities as police officers to accomplish our task.

BY MR. NISENBAUM:

Q. Is one of the factors that you're trained to take into consideration danger to the public?

MR. LOEBS: Objection. Vague. Incomplete hypothetical.

THE WITNESS: Could you give me a little more.

[43] BY MR. NISENBAUM:

Q. Well, in – in responding to a person who has a psychiatric disability who you have that information, where the person appears to be exhibiting some type of threatening or violent behavior as a consequence of their psychiatric disability, is one of the factors with respect to your response to that person the potential danger or threat posed to the public by that person?

A. Yes.

Q. Okay. And also the person's disability is one of the factors as well; is that correct?

MR. LOEBS: Objection. Vague and ambiguous as to what you mean by one of the factors.

BY MR. NISENBAUM:

Q. In your response.

MR. LOEBS: Same objection. Doesn't make sense.

THE WITNESS: The disability really is not a factor in my mind in that situation. If the public is at risk and citizens are in harm's way, the disability is – it's a consideration, but it's not, I don't believe it does not apply to giving the individual the freedom to do whatever they want to do.

* * *

[89] Q. It's a fairly specific measurement. And what was your weight at the time?

A. I fluctuate between 125 and 128 pounds.

Q. Okay. And with respect to Ms. Sheehan, I know you probably didn't know obviously prior to seeing her, but sitting here now, do you have a recollection of how tall she is?

A. Since we're changing the subject, do we want a break?

Q. Just after I ask these couple questions.

A. I'm sorry. Your question again.

Q. Do you have a recollection as to how tall Ms. Sheehan is?

A. It seems that she was taller than me, but I don't know how tall. Like 5'5, maybe 5'6.

Q. A little bit taller than you?

A. A little bit taller than me.

Q. Okay. And how about a sense of her weight?

A. The day of the incident I felt Ms. Sheehan probably was a good 250 pounds. Seemed obese to me.

* * *

[98] Q. And do you know whether or not people other than police officers can do 5150s?

A. Yes.

Q. And can they?

A. Yes.

Q. And is there a particular card that can authorize a qualified person to do a 5150?

A. Yes, there is.

Q. And what type of card is that?

A. It's a card that's certified by the City and County of San Francisco that has given them the authority.

Q. Okay. At some point did you find out whether Mr. Hodge possessed such a card?

A. I did.

Q. Okay. And did he?

A. Yes, he did.

Q. And when did you find that out?

A. Once on scene, I actually looked at the card.

* * *

[106] Q. Okay. And from this information did you – did you have an understanding that Ms. Sheehan was a patient of Mr. Hodge?

A. Well, yeah, I gleaned from this information that Ms. Sheehan – Mr. Hodge was Ms. Sheehan's social worker, yes.

Q. Okay. And okay. So about how long after you got the – about how long after you – you got the call from Officer Holder did you arrive at 1941 15th Street?

A. I'm not sure, but I know I responded almost as soon as I took the phone call. And I would say a few minutes.

Q. Okay. And once you arrived on scene, what happened next?

A. I met with Officer Holder and social worker Heath Hodges [sic].

Q. And what did you learn as a consequence of that meeting with respect to why you were called there or why you went there rather?

A. I learned that Mr. Hodges had intended on placing a hold for psychiatric evaluation, and he believed that he had enough through his evaluation that would support his hold. I learned that some of the reasons for him doing so was that Ms. Sheehan was off her medication. Ms. Sheehan had been acting strangely. [107] She was not eating.

I believe she was also not taking – not wash – taking care of herself in a – in a hygiene manner. I learned that she threatened – he went in her room at one point and she threatened to kill him with a knife. I learned that when she made those threats, he was fearful, so he left and he called 911. I learned a lot more, but that's kind of the gist of it, meaning of it.

Q. Okay. Did – did Mr. Hodge indicate to you whether or not he actually observed the knife?

A. I believe I asked him if he saw the knife, and he said he did not see a knife.

Q. Did Mr. Hodge indicate to you – strike that.

Mr. Hodge indicated to you that Ms. Sheehan was not taking her medication, correct?

A. Correct.

Q. Did he indicate to you why she was on medication or why she was supposed to be taking medication?

A. No. Not that I recall specific. Just that she had been off her meds for some time. I want to say a year or more.

* * *

[113] Q. Now, Ms. – Mr. Hodge told you that he had asked anyone who was there to leave; is that correct?

MR. LOEBS: Objection. Vague as to time.

THE WITNESS: I don't remember when that happened. But at some point during our interaction that was mentioned, and I don't know if I learned that through Mr. Hodges or Officer Holder.

BY MR. NISENBAUM:

Q. Okay. But you learned that prior to – strike that.

Do you know if you learned that prior to entering 1941 15th Street?

A. Yes.

Q. Okay. Now, at some point you did enter 1941 15th Street, correct?

A. Correct.

Q. Okay. And when you – well, why did you enter 1941 15th Street?

A. Well, to do my job. I was there at the request of Mr. Hodges who had intended on taking his client into custody, protective custody, because he felt she was deteriorating and violent and could possibly [114] harm someone. So I entered 1941 15th Street to assess and handle the call.

Q. Okay. When you say assess and handle the call, what do you mean?

A. Well, I recognized that Mr. Hodges had the authority to place the hold because he involved the SFPD and Officer Holder and was requesting our

presence to effect the arrest or detention, whatever you would like to – to call it. And we would be required to transport Ms. Sheehan because of the violent nature and the violent threats. Then my assessing was necessary to ensure that she in fact met the criteria that Mr. Hodge believed she met.

Q. Okay. So you would not be – is it fair to say based upon that you would not be able to rely upon Mr. Hodge's own 5150 evaluation?

MR. LOEBS: Objection. Vague.

THE WITNESS: It was a helpful tool, and I believe that I still had an obligation and I know I still had an obligation because our agency was involved to make sure that it was appropriate and lawful, and so, yeah.

* * *

[117] Q. Well, had you understood that Ms. Sheehan had made – strike that.

Did you understand that Ms. Sheehan had made any threat of suicide?

A. I don't recall hearing anything about suicide.

Q. Okay. And you didn't have any information that Ms. Sheehan had threated [sic] to harm herself, correct?

A. I had no information that she had threated [sic] to hurt herself.

Q. Okay. There was a threat to Mr. Hodge, but to your knowledge there was no threat to anyone else, correct? No explicit threat, threatening statement by Ms. Sheehan with respect to anyone else, correct?

A. Correct not explicitly, yes.

Q. And was there any – did Mr. Hodge give you any indication as to whether or not Ms. Sheehan had – had made any – had shown any type of threatening behavior with respect to the other residents of 1941 15th Street?

A. Well, I knew he was concerned for them based on her behavior, based on what she had done to him, and, yeah. So, yes.

* * *

[120] Q. Okay. And at some point you found out that Ms. Sheehan's apartment was on the second floor of 1941 15th Street, correct?

A. Yes.

Q. And how did you find that out?

A. Mr. Hodge directed us to that room.

Q. Okay. Did Mr. Hodge open the door to 1941 15th Street for you?

A. No.

Q. Okay. How was that door opened?

A. Mr. Hodge provided me a key and I used it.

Q. Okay. And that – and once you entered 1941 15th Street, what happened next?

A. Well, I actually got one foot in the doorway, and as I opened the door to get a better visual –

Q. Okay. I'm asking about – my understanding is that there – 1941 15th Street is like an apartment building?

A. Talking about the first door?

Q. Yeah.

A. Okay.

Q. The door to the building is what I'm asking about.

[121] A. Okay. So the key that he provided me actually worked the door downstairs and I believe the door upstairs. I can't remember if I needed the key to the downstairs door or not, if it was just opened. But I took the lead going upstairs.

Q. Okay. Now, in your police vehicle what – well, strike that.

Were you in police uniform?

A. I was in full police uniform, yes.

Q. Okay. And what kind of weapons were in your physical possession when you entered 1941 15th Street?

MR. LOEBS: Again, we're talking about the building and not her unit, right?

MR. NISENBAUM: Yes.

THE WITNESS: My pepper spray, my firearm, magazines.

BY MR. NISENBAUM:

Q. And when you – well, I understand you drove to that location. What weapons were in your vehicle? What weapons did you – what other weapons were in your vehicle other than those that were in your possession?

A. No other weapons in my vehicle.

Q. Okay. You did not have an ERIW in the trunk of your car, did you?

A. No, I did not.

[122] Q. Okay. Or in your car period?

A. No, I did not.

Q. Okay. And what about Officer Holder? Were you aware of what weapons she had in her car?

MR. LOEBS: Objection.

BY MR. NISENBAUM:

Q. Apart from the weapons on her person.

MR. LOEBS: Which are you asking about? Weapons on her person?

MR. NISENBAUM: Was she aware of what weapons were in Officer Holder's car, and I'm not

asking about the weapons that were on Officer Holder's person.

MR. LOEBS: Objection. Calls for speculation. Vague as to time.

THE WITNESS: I don't know what she had.

BY MR. NISENBAUM:

Q. Okay. So when you enter 1941 15th Street, what happened next?

A. We walked up the stairs. I was the first person to walk up the stairs. Officer Holder was the second person, and Mr. Hodge followed behind the two of us.

Q. Okay. And did you have any indication that anyone was home or anyone was present besides you, Officer Holder and Mr. Hodge and of course Ms. Sheehan [123] at 1941 15th Street by the time you got to the second floor?

A. I could not tell if anybody was present. There were no voices that I heard. There were closed doors, but I was unable to see the entire building.

Q. Okay. And did you knock on any of those doors?

A. No.

Q. Did you ask Officer Holder to knock on any of those doors?

A. No.

Q. Did you attempt to clear the – the – the building, the general building 1941 15th Street?

MR. LOEBS: Objection. Vague as to time.

BY MR. NISENBAUM:

Q. At any time.

A. No.

Q. Okay.

A. Well, I take it back. After the incident, yes, but prior to, no.

* * *

[125] Q. Okay. And did you think that Mr. Hodge would be a useful resource in communicating with Ms. Sheehan?

A. I thought that if the opportunity presented itself, that they might be an option.

Q. Okay. So once you get up on the second floor, what's the next thing that happens?

A. Mr. Hodge directs us to Sheehan's room, Ms. Sheehan's room.

Q. Okay. And were you able to tell – were you able to hear the sound of anything from Ms. Sheehan's room that you attributed as coming from Ms. Sheehan's room?

A. No. It was silent at that time.

Q. Okay. And was it otherwise silent as well?

A. Yes. The building was silent.

Q. Okay. Once he directed you to Ms. Sheehan's room, what happened next?

[126] A. I knocked on the door. I announced the police. Simultaneously in doing that, I was placing the key into the lock and, again, verbally said, I don't remember if I called her Teresa or Ms. Sheehan at that point, I had her name. And Teresa we're here to help you. It's the police. And then I turned the key and open up the door.

Q. Okay. Why did you open the door?

A. Well, I needed to make contact with Ms. Sheehan because she had just violently threatened her social worker. I also needed to do what I was explaining earlier, which was my own assessment, and I needed to see her in order to make an accurate assessment of what we had.

Q. Okay. Did you see her?

A. I did.

* * *

[130] Q. Well, once you opened the door to her room and you saw the window – strike that.

After – at some point you closed the door after you opened it, correct?

A. No. I didn't close the door.

Q. Ms. Sheehan closed it, correct?

A. She did.

Q. Okay. So after Ms. Sheehan closed the door, at that point in time, what – what exits out of the room were you aware of?

A. At that point in time I was aware of the door that we were standing in front of, and I was aware of the window.

Q. Okay. And in order to go out the window, Ms. Sheehan would have to go a further story down to get to the ground, correct?

MR. LOEBS: Objection. Calls for speculation.

THE WITNESS: Not knowing the terrain in the back of the house, I couldn't really answer that. One [131] would conclude that, but that's – I didn't know. There's different ways and buildings and levels of backyards in San Francisco. So I wasn't clear what I had back there.

BY MR. NISENBAUM:

Q. Okay. Did you send – did you request any police officers to cover the back of the building?

A. We did.

Q. Okay. And do you know if that happened?

A. I believe they did eventually get there, yes.

Q. Okay. So –

A. Well, I take that back. I don't know. I know we sent them, but I don't know if I recall hearing confirmation that someone was back there at any point prior to this incident exploding.

Q. Okay. So by the time that – that Ms. Sheehan closed the door, you had you [sic] confirmed that Ms. Sheehan was a 5150 subject?

A. Well, yeah. At that point I knew Ms. Sheehan had just threatened to kill. Not only did I know she threatened to kill her social worker and taking his word for what he saw, but now what I – the knowledge I have is that she just threatened to kill two police officers and charged at us with a knife.

* * *

[136] Q. Did you have any conversation with Lieutenant Padrini after you talked to Sergeant Holder over the telephone?

MR. LOEBS: Objection. Vague as to time.

THE WITNESS: I had a conversation with Lieutenant Padrini.

BY MR. NISENBAUM:

Q. Okay. How did that conversation occur?

A. I telephoned him.

Q. Why did you call him?

A. I wanted to make sure that I understood clearly what our role was going to be. I was familiar with the social workers being able to do that, however I had never actually been called out to the scene where a social worker has asked us to transport somebody that they 5150'd.

[137] So I had concern about paperwork. If we were going to be transporting for them, who was responsible for the paperwork. And I just wanted to make sure that when I arrived on scene I was going to instruct my officer appropriately. And so that's why I called my lieutenant.

Q. Okay. And Lieutenant Padrini told you that you should assume that you're the transporting unit and the social worker handles the paperwork and to leave it at that, correct?

A. No. That's not exactly how it – how it went down. I said some things to him about what I believed we were going to do and how we were going to do it. And he told me that that is appropriate, and if there's anything that changes, I will get in contact with you over the radio.

* * *

[140] Q. Okay. Lieutenant Padrini did not tell you to go do your own 5150 evaluation, did he?

A. He did not.

Q. Okay. That was something that you decided to do, correct?

A. I think I wouldn't categorize what I did as my own 5150 evaluation. And may I elaborate?

Q. If you like.

A. I wanted to further assess and ensure what Mr. Hodge had stated was possible and accurate, and then ensure that if in fact we were going to place her into our car that we had a – we met the criteria for a 5150.

Q. Okay. And by the time Ms. Sheehan closed the door, was it your belief that she had met the criteria for a 5150?

A. Definitely. That and then some, yes.

Q. Now, so Ms. Sheehan – going back again to when you opened the door. Where was Ms. Sheehan when you first saw her?

A. The first time the door was opened?

Q. Yes.

A. Lying on her bed.

Q. Did she have a book in her hand?

A. I believe there was a book laying on her [141] either chest or stomach.

Q. Okay. And did she appear to be physically injured?

A. No.

Q. Okay. And which way was her head oriented in the room with respect to the door that you opened?

A. Her head would be closest to me and her feet would be closest to the window.

Q. And what type of bed was she lying on?

A. A twin bed.

Q. Okay. And was it, like, a twin bed as in you have the box spring and then a mattress on top of it?

A. It's [sic] seems that it was high and not just one mattress sitting on the ground, but I don't know if it was a box spring or what it was on.

Q. Okay. Did you actually see Ms. Sheehan grab a knife?

A. I did.

Q. And where did she grab the knife from?

A. There was an area very close to her within arm's reach off to her right where – there were a lot of things there, but I believe it was a plate. I seem to recall a white plate with several knives laying there.

Q. Okay. By the way, did Mr. Hodge tell you that [142] Ms. Sheehan suffered delusions, was delusional?

A. I don't remember hearing that.

Q. Okay. So how did Ms. Sheehan get up off the bed, if you know?

A. Well, she raised up, reached over with her left hand very quickly grabbed one of the knives, a larger knife, from the plate and immediately walked in an aggressive threatening manner towards us saying, get out of here. I'm going the [sic] kill you. Get out of my room. I don't need your help. Stuff like that, and was repeating it over and over and over again.

Q. And was the knife in her left hand?

A. Yes. And she was screaming very loudly.

Q. Okay. And you say she walked towards you. How quickly did she move in walking?

A. I wouldn't say she ran, but it was an abrupt, very quick pace.

Q. And was she making any type of motion with the knife?

A. Yes. The knife was shoved out in front of her, blade pointed towards us. She had her hand on the – on the handle, and as she approached closer to us the knife was always in front of her and there was some moving going on, like a jabbing motion or a stabbing motion.

[143] Q. Okay. And with respect to the motion that you're making. You're holding your – your – it would be your left hand, you're holding it at about chest level with the arm extended?

A. Correct.

Q. Okay. And was the blade coming out – and her hand was kind of closed? Her hand was closed around the handle of the knife; is that correct?

A. I'm assuming so. I didn't see like a fist around it, but I know she had a good grip on the knife.

Q. And was the blade coming out of the pinky side or out of the thumb side?

A. The thumb side.

Q. Okay. So the knife was not held up over her head, correct?

MR. LOEBS: Objection. Vague as to time.

BY MR. NISENBAUM:

Q. At – well, up through the point in time when the door was closed, when Ms. Sheehan closed the door.

A. At the point when Ms. Sheehan came towards me –

Q. Yeah.

A. It was out in front of her. It was moving very fluid. It could have gotten high, but for the most part it was directly in front of her as if she's coming [144] at my face.

Q. Okay. And did she jab the knife forward?

A. As she came forward, the knife is moving and her arm is extended, and it's jabbed out. It's shoved out. It's kind of thrown out at us.

Q. Well, my question is, was it jabbing? Was it – let me – let me be more specific about what I'm asking.

A. Okay.

Q. Did she hold the knife out with her arm extended kind of in that position as opposed to thrusting it forward and backwards?

A. There was a combination of movement, and at some point, you know, a stiff arm. But she definitely made motions and moved her arm. It wasn't like just a stuck arm walking towards us in a fixed place.

* * *

[145] Q. Okay. And was Ms. Sheehan moving it left and right as well as what you described?

A. It's possible. But at that point more forwards and backwards in a stabbing motion, but it's possible she went left to right.

Q. Okay. But she did not run at you, correct?

A. I – I wouldn't categorize it as run. I would – I would call it a very abrupt, quick charge at us. There wasn't really enough room to get up a running momentum.

Q. Did – did Ms. Sheehan say that she did not need any help?

A. Yes.

Q. Okay. Now, your foot was in the doorway when she approached you, correct?

A. Yes.

Q. Now, how was Ms. Sheehan able to close the door, if you know?

[146] A. Well, as she closed the distance between she and I, I became fearful that I was going to be stabbed in the face. So I leaned back and at one point tried to keep my foot in the door so that I could still have a visual without getting stuck with the knife. But as she closed the distance entirely, it became clear that I had to move my foot, or I was going to get stabbed. And once I pulled my foot out of the threshold, she was able to close the door on me.

Q. Okay. Did Ms. Sheehan reach the knife out past the threshold of the doorway before she closed it?

A. I don't believe it made it out across the threshold of the doorway.

Q. Okay. And you're certain that it was Ms. Sheehan who closed the door, correct?

A. Yes.

Q. Okay. Were your guns out at that point? Was your gun out I mean?

MR. LOEBS: Objection. Vague and ambiguous as to time.

BY MR. NISENBAUM:

Q. By the time Ms. Sheehan closed the door, was your gun out?

A. No. As soon as that happened is when I drew my weapon, but my gun was not out up until she presented [END OF P. 146]

* * *

[148] Q. Did you direct Officer Holder to get the door open?

A. Yes.

Q. Okay. While the door was closed, what threat did Ms. Sheehan pose to you or Officer Holder?

A. Well, a lot at that point. With the door being closed and us not having the ability to see what she was doing, we had no way of knowing whether or not, one, she – she had an avenue of escape. Two, there were the possibility of other weapons that she could gain access to. And so in my opinion, as soon as that door was closed, the threat became more scary for us and more uncertainty about what we were dealing with.

Q. Well, you were certain that you were dealing with a person who at least had a knife, correct?

A. Yes.

Q. Okay. And how long was the blade on that knife?

A. About five inches, might be six inches.

Q. Okay. And did you see other knives in the [149] room?

A. I did.

Q. And I'm talking again about during the time period that the door was opened the first time.

A. Yes, I did.

Q. Okay. So apart from those other knives and the knife that Ms. Sheehan possessed in her hand, what other weapons did you see in the room?

A. A lot of things could be used as weapons, but if you're speaking specifically of guns and knives –

Q. Weapons, yes.

A. – there was nothing else that I saw other than the knives.

Q. Okay. What else did you see in her room that you thought could have been used as a weapon other than a knife or knives?

A. I don't have a specific recollection. But just, you know, through my experience, there's a lot of things that could be used as weapons. Glass bowls and, you know, bats and whatnot. And I wasn't able to canvass the entire room.

Q. Did you see a bat in her room?

A. Not that I recall, no.

* * *

[168] Q. Okay. So with that in mind, what – what guides your – your – your actions as a police officer once at the point in time when Ms. – when the door is closed, what factors guide your actions as a police officer based upon your training?

MR. LOEBS: Objection. Vague.

THE WITNESS: Many factors. At that point when the door is closed after she's already posed a – or displayed obvious signs of violence and wanting to kill Officer Holder and I, officer safety is an important factor. Preventing her escape is an important factor, because then she could become a threat to other individuals.

And without getting into a long narrative, there are so many things, so many variables that sort of dictate where we go in this situation. It's fluid, so.

BY MR. NISENBAUM:

Q. Well, Ms. Sheehan didn't try to attack you through the door, did she? Once the door was closed, she did not try to attack you?

A. I couldn't see what Ms. Sheehan was doing [169] behind the door. So I don't know what she was doing.

Q. But to your knowledge, she wasn't trying to attack you once the door was closed, correct?

MR. LOEBS: Objection. Misstates the testimony.

THE WITNESS: I don't know what Ms. Sheehan was doing. I had no way of seeing her conduct or behavior from behind the closed door.

BY MR. NISENBAUM:

Q. Okay. So with the door between you, that's a barrier between you and Ms. Sheehan, correct, when the door is closed?

A. Yes.

Q. Okay. And it's a barrier that effectively, you know, prevents her from attacking you with the knife; is that correct?

MR. LOEBS: Objection. Vague as to what you mean by effectively.

BY MR. NISENBAUM:

Q. Well, the knife – if she were to attack you with the knife, it would actually have to go through the door. Somehow you would have to be within knife's blade length of the door in order for the attack to be effective, correct?

MR. LOEBS: Assuming the door doesn't get [170] opened?

MR. NISENBAUM: Correct.

THE WITNESS: There's a little more sense of, I want to say comfort, not completely comfortable,

but there's more of a sense, okay, the door's closed. She's not able to stick the knife in my face as she was earlier. So there's a little bit less of a threat there, yes.

BY MR. NISENBAUM:

Q. Okay. And this was not a situation where she disregarded the door, came through the door and continued attacking you with the knife, correct?

MR. LOEBS: Objection. Vague as to what you mean by disregarded the door.

BY MR. NISENBAUM:

Q. Well, she closed the door herself.

A. Right.

Q. Okay. So she's the one who put that barrier up, correct?

A. Right.

Q. Okay. Now, it's your intention to get the door reopened, correct?

A. Yes.

Q. And it was your intention to subdue Ms. Sheehan after getting the door reopened, correct?

[171] A. Yes.

* * *

[177] Q. In the sense that you don't – you didn't know whether or not you had backup behind the building?

A. We were in the process of – of doing multiple things all at once. There were radio communications. There were directions given. Actually asking officers to respond to lock down the perimeter. There were variable – various things that were taking place as this incident unfolded.

Q. So after you confirmed that Ms. Sheehan was indeed a 5150 subject, you instructed Officer Holder to – to remove the barrier between you and Ms. Sheehan, correct?

A. I instructed Officer Holder to attempt to gain access to the room, yes.

Q. Okay. And that meant removing that barrier, correct?

A. An attempt to force the door open, yes.

Q. Okay. And you knew at the time that Ms. Sheehan had a knife in her possession, correct?

A. That's correct.

Q. Okay. And you knew in removing the door that you would – that you were removing a possible line of defense against Ms. Sheehan, correct?

[178] A. That is – yes, that is part of my job, and yes, I did. I was aware of that.

Q. So you knew you were putting yourself in danger by having the door to her room opened, correct?

MR. LOEBS: Objection. Vague.

THE WITNESS: Well, I also felt like there was a risk. But I also felt like I was attempting to be able to see more of what Ms. Sheehan was doing. Because the uncertainty of not knowing what she was doing posed a tremendous fear for me and my officer. And then the possibility of the escape is also extremely frightful because had she been able to injure somebody else, then it would have been our responsibility.

BY MR. NISENBAUM:

Q. So back to the possibility of escape. So we've discussed the windows that you had seen. And there's a door. Mr. Hodge was present, correct?

MR. LOEBS: Objection. Are those – is that all one question? That's four – it's four parts. Commentary's not a question.

BY MR. NISENBAUM:

Q. Mr. Hodge was present at the time Ms. Sheehan slammed the door closed, correct?

A. He did see that, yes.

Q. Okay. Well, he was there, right?

[179] A. Yes.

Q. You don't know what he saw, but he was there?

A. Right.

Q. Okay. So he would be a person to ask about other ways in or out of the room, correct?

MR. LOEBS: Objection. Vague and ambiguous as to what you mean by a person to ask.

THE WITNESS: Not at that moment. It was my scene and my experience as a police officer and a supervisor to continue – continue doing the things that I knew I had to do, which were many. One of which at that moment was not to ask and attempt to rely on a social worker's accuracy about whether or not he knew someone was in the room or there was another avenue of escape. It would have been information that might have assisted, but not guarantee anything.

* * *

[BEGINNING OF P. 181]

[181] reasonably expect that Ms. Sheehan, if she were to escape from that window, you would reasonably expect she would have to drop a full floor in order to – a full story in order to escape, correct?

A. In many of the buildings in San Francisco, there are fire escapes. Other thoughts that go through officer's minds and in this day was me not being able to assess the whole room. Was there another door that may connect to another room in the

building. I don't know that. I didn't have an opportunity.

Q. And you never took steps to ask Mr. Hodge that information either, correct?

A. At the moment things unfolded, no.

Q. Okay. Instead you ordered the barricade between Ms. Sheehan and yourself to be removed by Officer Holder, correct?

A. Yes.

Q. And at the time you did that, did you expect that – what did you expect Ms. Sheehan would do, if anything?

A. I had to [sic] idea what she was going to do. I just knew that this situation required our immediate attention and was an emergency and imminent and there was no way to undo what – what happened.

* * *

[184] THE WITNESS: At this point in my mind the disability, the mental illness, however you'd like to refer to it, became a secondary issue. And what I was faced with was a violent woman who had already threatened to kill her social worker. Said she would do it with a knife. And now I've witnessed her attempting to do that to two uniformed police officers and have the ability to do that by using the weapon. So I don't understand what you're asking me for as far as accommodating a disability.

* * *

[191] Q. Did you hear sirens before the door was open the second time?

A. Yes.

Q. And did you direct Mr. Hodge to open the door to the building at 1941 15th Street for backup?

A. I did.

Q. Okay. And to your knowledge, did Mr. Hodge leave the second floor of 1941 15th Street?

A. Yes. I watched him leave.

Q. Okay. He went towards the stairway?

A. He was already leaning over the railing and was at the stairway.

[192] Q. Okay.

A. And I watched him come to the top of the stairwell and then walk down until I couldn't see him anymore. Then I redirected my attention to –

Q. And when you redirected your attention, what did you observe?

A. Ms. Sheehan coming out of her room screaming with the knife if [sic] her hand yelling, I'm going to kill you.

Q. And how was she holding the knife?

A. I believe it was still in her left hand, but I'm not 100 percent sure, and it was still with the blade

up. And at this point she's yelling and her arm is up in the air really high.

Q. Okay. And again, you describe a blade up. Was the blade coming out of, like, the thumb, forefinger area?

A. I believe so. I'm not 100 percent sure, but I believe so.

Q. Okay. And that would be as opposed to coming out of – if her hand were wrapped around the handle the blade coming out of the pinky side, correct?

A. Correct.

Q. Okay. Again, I need verbal language.

A. Yes. I'm sorry.

[193] Q. Thank you. No problem. And by the way, the door to the room, to Ms. Sheehan's room, did that door open inward into her room or outward away from her room?

A. If you're facing the door from the outside, it opens inward from right to left.

Q. Inward into Ms. Sheehan's room?

A. Correct.

Q. Okay. From right to left from the perspective of the person in the hallway facing the room?

A. Correct.

Q. Okay. Facing the door that is?

A. That's correct.

Q. Okay. And what happened next after – after you turn around and you see Ms. Sheehan coming out holding the knife in the manner you describe?

A. I start to create a distance. Simultaneously I raise my pepper spray up and I begin to administer the pepper spray into her face.

Q. Okay. Did you see her glasses at that point?

A. Initially I didn't. What I saw was her mouth because she was yelling and screaming. And I believe pepper spray went initially into her mouth, and then I realized within a quick moment that she had the glasses on. And I – as I was trying to come up on target, I was hitting the glasses. And then I needed to raise my [END OF P. 193]

* * *

[196] BY MR. NISENBAUM:

Q. Did you direct Officer Holder to get out her pepper spray?

A. I did.

Q. Okay.

MR. LOEBS: That's not what you said. You act as though – it's not what she said.

BY MR. NISENBAUM:

Q. What was the purpose of – and what was the purpose of requesting Officer Holder to get her pepper spray out?

A. To provide another line of defense if appropriate not knowing really how things were going to unfold.

Q. Okay. To provide a line of defense separate and apart from a firearm?

A. Correct.

Q. Okay. Was it your anticipation that the pepper spray would be used prior – against Ms. Sheehan prior to the use of a firearm against her?

A. That question is hard to answer because we had our firearms out and Officer Holder initially was the pepper spray person. Depending on what we were going to deal with, it would have been an individual call on how Officer Holder would have chosen to use that pepper [197] spray.

Q. Okay. Then she gave – then when you had Officer – when Officer Holder began to try to get the door open, you took Officer Holder's pepper spray, correct?

A. That's correct.

Q. Okay. So then you had her pepper spray out and you had your gun out, correct?

A. That's correct.

Q. And by the way, when you were trying to get the door opened, you had your gun out, correct?

A. I did, yes.

Q. And when Officer Holder was trying to get the door opened, she had her gun out, correct?

A. That's correct.

Q. And I take it by having her gun out it was a gun in her hand, correct?

A. Yes.

Q. Okay. So – so you soaked Ms. Sheehan's face with pepper spray after you turned around and saw her coming out of the room with the knife in – in the position you indicated, correct?

A. Correct.

Q. Okay. Then what happened?

A. It became clear to me that the pepper spray [198] was not doing anything to Ms. Sheehan. And Ms. Sheehan had then had an opportunity to advance further towards Officer Holder backing her into a corner.

Q. Okay. What corner did she back Officer Holder into?

A. There's a little area in the hallway, so to speak, that was diagonal from Ms. Sheehan's door

where Ms. Sheehan charged out and backed Officer Holder up into this angle.

* * *

Q. Okay. Looking at Exhibit K. Does Exhibit K show – first of all, are you familiar with Exhibit K? There are some markings on it. Disregarding those markings are you familiar with Exhibit K?

A. Yes.

* * *

[201] Q. Okay. And do you know – you say Officer Holder was backed into, I guess, the area that you said Ms. Sheehan backed her into?

A. Correct.

Q. Could you tell if Officer Holder was moving backwards but facing Ms. Sheehan?

A. Yes. Her – I saw her initially move along while I was moving, and she was backing up away from Ms. Sheehan.

Q. Okay. And there's a, I guess, that would be a small circle with nothing inside it in Exhibit K. That is on the left side of the door, of Ms. Sheehan's door, if you're facing the door. Do you see that?

A. Yes.

* * *

[202] Q. Well, was that – where was Officer Holder in relation to that circle on Exhibit K?

A. At what point?

Q. Well, she was backed into the alcove?

A. Initially, when she was backed into the alcove, you know, as the two of us backed away together as she's progressing or – or advancing backwards, moving backwards I should say, she goes from about this position to over here (indicating.)

Q. Okay. From this you need to indicate what you're pointing at.

A. Kind of near where your circle is, but I think her original position was more up here (indicating.)

Q. Up here being closer to the doorway?

A. This is prior to the door opening, yes.

Q. Okay. And then moving back towards the circle and back beyond the circle?

A. Correct.

MR. LOEBS: Objection. Vague as to what you mean by beyond the circle.

[203] BY MR. NISENBAUM:

Q. Behind the circle. To the left of the circle if you're facing the door.

MR. LOEBS: Well, she indicated with her hand to the left and down towards the bottom of the photograph of Exhibit K is where she directed her hand.

BY MR. NISENBAUM:

Q. Is that accurate?

A. Yeah. It would be most helpful for me to describe as Officer Holder backed out of the initial alcove area at a diagonal left angle.

Q. Okay.

A. And at one point I lost visual of her.

Q. Okay. And Ms. Sheehan, which way did she move?

MR. LOEBS: Objection. Vague as to time.

BY MR. NISENBAUM:

Q. As Officer Holder was backing into that location.

A. As Officer Holder was backing into this location, Ms. Sheehan was advancing on Officer Holder.

Q. Okay. And was she facing Officer Holder?

A. Yes.

Q. Okay. And when you pepper-sprayed Ms. Sheehan initially when the pepper spray – when you first saw [204] your pepper spray strike Ms. Sheehan, where was Ms. Sheehan?

A. Probably right at that threshold area I was telling you about.

Q. The threshold of her door?

A. Yes.

Q. And when you stopped pepper-spraying Ms. Sheehan, where was she?

A. Where was Sheehan?

Q. Yeah.

A. Over here (indicating.)

Q. Here being towards the circle area that is to the left of Ms. Sheehan's door?

A. Correct.

Q. Okay. And what hand was your pepper spray in?

A. My left.

Q. And what hand was your gun in?

A. My right.

Q. And Ms. Sheehan, could you tell what hand the knife was in?

A. I'm not as clear, but I'm still believing that it was the left hand at that point.

Q. Okay. So was the left side of Ms. Sheehan's body then the closest part of Ms. Sheehan facing you – strike that.

[205] What part of Ms. Sheehan's body was facing you when you finished – when you finished pepper-spraying her?

A. It would be her left body at an angle as she's advancing on Officer Holder.

Q. Okay. And did you move closer to Ms. Sheehan as Ms. Sheehan advanced on Officer Holder?

A. Not immediately.

Q. Okay. Did you move in any direction?

A. Yes.

Q. What direction?

A. I backed down the hall this way (indicating.)

Q. By this way, you're pointing towards the bottom of the exhibit from I'd say between – well, from – from where to where?

A. I don't know where I ultimately ended up, but I remember creating a distance that – that felt, you know, far enough that I was still administering the pepper spray and far enough that at that point Ms. Sheehan couldn't place the knife in me.

Q. And what – what distance are you trained that pepper spray is effective up to?

A. At this time I'm not – I don't remember. But it's, you know, it can be effective, or it can't be effective depending on the circumstances of the [206]

individual. It has really not much to do with distance, but whether or not –

Q. Well, I'm asking about your training –

MR. LOEBS: She hadn't finished her answer and you interrupted her.

MR. NISENBAUM: Sorry.

THE WITNESS: So I believe 15 feet is sticking in my mind, but I'm not – I can't be accurate on that right now as we're sitting here.

BY MR. NISENBAUM:

Q. Okay.

A. It allows us to create a pretty good distance.

Q. Okay. And once you stopped pepper-spraying Ms. Sheehan, what happened?

A. Well, I threw the pepper spray down and began advancing back towards Officer Holder and Ms. Sheehan.

Q. Okay. And then what happened?

A. Just prior to – to that happening, there was a round that went off from Officer Holder.

Q. A single round?

A. One single round initially, yes.

Q. Okay. And after you heard that, did you advance closer to Ms. Sheehan?

A. I did. That's when I discarded my pepper spray, and I advanced back towards Ms. Sheehan.

[207] Q. Okay. And then what happened?

A. I began raising my firearm up so that I could come on target. And I'm not clear when Officer Holder's second round went off, but I believe her second round went off and then I came on target and – and started to fire.

Q. Okay. And how many times did you discharge your firearm?

A. I'm not 100 percent sure. I believe three times.

Q. Okay. And then what – in what target area?

A. Initially as I'm closing the distance now and approaching Ms. Sheehan and attempting to assist Officer Holder, I'm raising up on target. But it's possible that one of my rounds was discharged at a low angle, but my intention, my goal, was to continue up so that I came on target, as we're trained to do.

Q. Okay. What was your target area on Ms. Sheehan's body?

A. At the point of the –

Q. When you first started shooting.

A. – final discharge?

Q. When you first started shooting.

A. It was – I was attempting to get to – to a center mass area.

[208] Q. Okay. When you fired your first shot, where was your gun? What part of Ms. Sheehan's body was it directed at?

A. You know, I can't be sure exactly where it was. I don't know. I know I was coming up on target.

Q. What direction relative to you was Ms. Sheehan facing when – when you discharged the first round?

A. I'm not sure if she is completely turned at that point or if there was a side of her facing me. But what took place was she was still facing Officer Holder, and then she spun and faced me. And I know I delivered another round as she was now presenting the knife and still yelling and attempting to assault me at that point.

Q. When you fired the second round at Ms. – was Ms. Sheehan facing you?

MR. LOEBS: I'm going to object to – you said you're referring to two rounds, one, two and three. She did say she wasn't 100 percent sure there was three. So if your question suggests that, that would be argumentative and inappropriate.

MR. NISENBAUM: Okay.

Q. You are – let me ask you this. You're aware of at least two rounds you fired, correct?

A. Yes.

[209] Q. Okay. And so I'm asking you with respect to the rounds that you recall firing. So you described the first round that you recall firing as Ms. Sheehan was kind of, I guess, facing Officer Holder's direction, correct?

A. I'm sorry. Say the beginning part of that again.

Q. Ms. Sheehan was kind of facing Officer Holder's direction when you fired the first round, correct?

A. I'm not sure. I'm not sure if she was still facing Holder or she had actually turned on me at that point.

Q. Okay. The second round that you recall firing, what – what position was Ms. Sheehan relative to you?

A. Facing me.

Q. Okay. And where was that round directed at?

A. Center mass.

Q. Okay. You've reviewed your MCD interview, correct?

A. I have.

Q. Okay. Did you tell MCD that you shot Ms. Sheehan three times?

A. I believe I said I thought I shot her three [210] times, but I'll still not sure to this day how many times I fired my weapon.

Q. Okay.

A. It could have been two. It could have been three.

Q. Well, how many bullets were left in your gun? Did you find that out?

A. I never found out. I don't have the ballistic's [sic] information to this day.

Q. The last shot you fired at Ms. Sheehan, what do you recall that being?

A. The last shot I remember firing actually went into Ms. Sheehan's face.

Q. And is this the same shot that you just described?

A. Which? The one that was at center mass?

Q. Yes.

A. I don't know.

Q. Okay. How do you know it went into her face?

A. Because I have a very vivid clear memory of her being very close to me and screaming and my round going into her face.

Q. And where was the knife – well, about how far from you was she when you fired that shot?

A. It seems to me, I'm not sure, but maybe three [211] feet, two to three feet. Between two and four feet might be a fair assessment.

Q. Okay. Now, Ms. Sheehan – so the last shot you recall firing Ms. Sheehan was on her feet; is that correct?

A. That's correct.

Q. Are you aware that Officer Holder has testified that the last shot you fired at Ms. Sheehan, Ms. Sheehan was on the ground?

A. I'm aware Officer Holder has testified to that, yes.

Q. Okay. Are you aware – well, strike that.

Now, do you know whether or not you fired any further shots after – after Ms. Sheehan – after the shot that went into Ms. Sheehan's face?

A. Yes. I didn't fire any more shots after that.

Q. Okay. Well, what happened after you fired that last shot?

A. Ms. Sheehan finally dropped to the ground and layed [sic] there still screaming, but still clenching the knife in her hand.

Q. Was Ms. Sheehan – what position was Ms. Sheehan on the ground?

A. I believe there were a lot of positions because it wasn't like she just layed [sic] completely still.

[212] But the best of my recollection she was laying on her left side, knife in the left hand but not flat on her back, but more at a, you know, an angle.

Q. And you've – you've kind of positioned your body at an angle kind of as if you were leaning on your left side; is that correct?

A. That's correct.

Q. Okay. So the side that Ms. Sheehan was – was laying on was the side that she had the knife in, correct? The side – that was on the side that had the hand that she had the knife in?

A. It's possible, but again I'm not 100 percent sure that the knife was in that left hand. I just know that she definitely had it clenched. And it seemed to me that it was the left hand, but I'm not sure.

Q. And where were you when Ms. Sheehan fell to the ground? And let me know if Exhibit K assists in identifying any location you were at when Ms. Sheehan fell to the ground.

A. I don't recall where I was exactly when she fell to the ground, but I know I had backed up again to move away from her because she still had the knife in her hand.

Q. You backed up down the hallway?

A. Not – not too far down the hallway because we [213] were still dealing with the situation. But maybe if I can use Exhibit K.

Q. Yes.

A. Maybe somewhere around here (indicating.)

Q. And you're kind of indicating just short of the door on the right side of Exhibit K. If you're facing it – if your [sic] facing Ms. Sheehan's door, there's a doorway that comes down the wall, the right-side hallway. Do you see that doorway?

A. Yeah.

Q. And so you'd be to your best recollection kind of just before that door in between Ms. Sheehan's door and that doorway, but just before the doorway and the hallway; is that right?

A. It's pretty accurate. Enough to be able to see Officer Holder here. So it's hard to tell if these line up. And I don't recall, but I know I was close enough to see Officer Holder still stuck here and Ms. Sheehan laying down.

Q. Okay. So was – was – what was Ms. Sheehan doing when she was on the ground after she fell to the ground?

A. He wasn't rising up, but she was moving and screaming and yelling things that I can't even remember. It was very loud and –

[214] Q. Go ahead.

A. And the screams were, you know, a combination of pain and, I mean, I can't speculate, but it seemed like, you know, she was hurting, and she was [sic] also still had what I would consider a death grip on the knife and flailing and refusing to let go of the knife.

Q. Okay. Now, at some point – oh, by the way, do you recall her saying the words, I'm dying?

A. I believe she did say that. I remember hearing something like that.

Q. Are there any other words that you recall her saying or yelling?

A. At that point, no.

MR. LOEBS: Objection. Vague as to time.

THE WITNESS: I'm sorry.

BY MR. NISENBAUM:

Q. Well, after she fell to the ground.

A. No.

Q. Okay. Now, as I understand it you saw Officer Zachos come in at some point in the hallway?

A. Yes.

Q. Okay. And where was he when you first saw him?

A. So in Exhibit K I'm still standing to that area I was talking about earlier, which is off to the

[215] right of the hallway and able to see Officer Holder. At somewhat of a distance from Ms. Sheehan and the knife. And as I'm standing there covering down on Ms. Sheehan with my firearm, the first time I see Officer Zachos is as he came through on my peripheral vision. I caught a glimpse of him out of the left of my eye, my left peripheral.

Q. And what happened after you saw Officer Zachos?

A. I told John to be careful. She still has the knife in her hand. I also was trying to negotiate how I was going to get Holder out, because this area is extremely confined. So I told John, John be careful.

She's still got the knife in her hand. And as I'm covering down on Ms. Sheehan and John walks past me, or comes past me, I now have to drop my firearm away from Ms. Sheehan because I've got my gun basically pointed in the direction where John had just walked in, came in.

During that point, I see John kick the knife out of Ms. Sheehan's hand. I see him slip in the blood.

And then as that takes place, I'm waiting for an opportunity, and I'm grabbing Officer Holder who's now still stuck over here. And I shove Officer Holder back to the – to the back of the hallway where several other officers were.

* * *

[218] Q. But the hand that the knife was in and Officer Zachos kicked it, it was still in the same hand that – that it was in after she fell to the ground, is that correct, after Ms. Sheehan fell to the ground; is that correct?

A. So you've got John kicking it, but then you've got her falling to the ground, which happened earlier. So I'm sort of confused.

Q. No. After she fell to the ground, the knife was in her left hand as best as you recall, correct?

A. Correct.

Q. Okay. And she's kind of lying on her left side to some degree, correct?

A. Yes.

Q. Okay. And it was – it was in that same hand when Officer Zachos kicked it; is that correct?

A. I'm not 100 percent sure. Like I said, I looked at Officer Holder and was trying to negotiate getting her out. But I believe so, but I'm not 100 percent sure.

Q. Okay. How sure are you?

A. It seems to me that it's stayed in that hand, [219] but I looked away and focused on Kathrine for a minute. She was still trapped. So I believe it was, but I couldn't say 100 percent.

* * *

Q. [220] Okay. When Officer Zachos kicked the knife out of Ms. Sheehan's hand, where was Officer Holder?

A. She was still in this corner over here stuck.

* * *

[222] Q. Okay. Okay. So you had told Mr. Hodge to go, correct?

A. I did, yes.

[223] MR. LOEBS: Objection. Vague as to time.

BY MR. NISENBAUM:

Q. To go downstairs at some point in time, correct?

A. I gave Mr. Hodge an order to go downstairs, yes.

Q. Okay. And at that time, where were you located?

A. At that time I was still standing right in front of the door.

Q. Okay. Okay. So you gave him that order, and this is – so [sic] is while you were giving him that order that the door opened, correct?

A. What I can say is as I turned over my right shoulder and told Mr. Hodge to go open the door and then redirected my attention to the door, now Ms.

Sheehan is coming out of the door and the door is opened.

* * *

[224] Q. Okay. When did it click for you that this was not a good situation? [Colloquy omitted.]

* * *

[226] THE WITNESS: When that was stated and when I was there and that happened, when it became clear to me that the situation had gotten to a point where the pepper spray did not work and that we were going to have to defend ourselves and protect ourselves and – and I don't know that for that moment exactly what I was thinking, but I knew, oh my God. The pepper spray's not working. She's now very close to Kathrine with this knife saying she's going to kill Kathrine. And I knew we were in a really bad situation. And things were not good.

BY MR. NISENBAUM:

Q. Okay. So it didn't click for you that it was a really bad situation prior to that; is that correct?

A. Well, no. I believe a lot of it was bad. But [227] in that sense, me making that comment and me feeling what I felt at that moment was we had just exhausted some of our tools and abilities and resources to defuse it without having to resort to lethal force. And so I became fearful at that point. But there were many other times during the incident where I was afraid, where things weren't good. I mean, it

wasn't a sweet little encounter the entire time. Obviously the first time she came at me with a knife things weren't good. So does that answer your question?

Q. It's your answer to the question I assume. She's – you described Ms. Sheehan as being really, really deranged and crazed. Did you recall reading that in your answer?

A. I do.

Q. And when did you first realize that Ms. Sheehan was really, really deranged and crazed?

A. When she had advanced on us and yelled, I'm going to kill you. Get out of here. I don't need your help. And when she aggressively charged at us and tried to kill us and tried to stab us with the knife and screaming.

Q. So the first time you realized that Ms. Sheehan was really, really deranged and crazed was before Ms. Sheehan closed the door on you, correct?

[228] A. That's not what I said.

Q. Okay. That's what I'm trying to get at. She made those comments before she closed the door on you after the door was opened the first time and before she closed the door on you, correct?

A. She initially made those comments, yes. But as she came out they were communicated in a much more deranged, psychotic way.

Q. So did you realize though that Ms. Sheehan was really, really deranged and crazed the first time she came at you with the knife, threatened to kill you, and then slammed her door closed?

A. I would say I knew she was crazy for obviously trying to bring a knife and stab two police officers. But the word deranged may not have come to me at that point up until she entered the hallway and was screaming just unintelligibles and I'm going to kill you. And that's when it became obvious to me that she was that – and the pepper spray's not working.

It's like one of the things for me, the signs, the clue was, okay, pepper spray's not having any effect on her. That is an indication to officers that you've got an extremely, under the influence, heavily under the influence person or a really crazy person that has no feeling about what type of force you're using. So [229] that – that's when to me the deranged part clicked.

Q. Okay. You also indicated in the segment that I had you review that – I think you said, quoting, "And so I right then was kind of like awaking. This is not a good thing, and I'm really afraid of this woman and what we're going to do."

MR. LOEBS: Can I look at a line? Do you have a line, Ben?

MR. NISENBAUM: This is the second half of 19:3 through 19:12.

THE WITNESS: Okay.

BY MR. NISENBAUM:

Q. Okay. So when was right then that you're referring to?

A. When was right then that I'm referring to?

Q. In that statement. At what point in time?

A. In my – this part that was I referring to?

Q. Right. In your MCD interview.

A. Let me just read it again. I would say after the pepper spray failed to affect her in any way, and she continued her advance on Officer Holder.

Q. At the start of that passage at 19:3 you said, "This person is not responding the way they are supposed to respond." What did you mean by that?

A. Well, when you pepper spray somebody, it [230] usually burns and can cause people to pretty much drop whatever they're doing under normal circumstances. So would you just repeat that question again.

Q. I just want to know what you meant by, "This person is not responding the way they are supposed to respond."

A. Okay. So she wasn't responding to the pepper spray the way we're told in the academy. The way we're trained.

Q. Okay. So the fact that she wasn't following your orders, that was something that you kind of

expected given the circumstance, the 5150-type circumstance; is that correct?

MR. LOEBS: Objection. Misstates her testimony.

THE WITNESS: I don't believe we were just talking about verbal orders. I believe we were just talking about the pepper spray.

BY MR. NISENBAUM:

Q. Did you expect that Ms. Sheehan would simply follow your commands?

MR. LOEBS: Objection. Vague and ambiguous as to what you mean by simply and vague as to time.

BY MR. NISENBAUM:

Q. At any time.

[231] MR. LOEBS: It's compound.

THE WITNESS: If you could give me a specific time, I can give you a better idea about that.

BY MR. NISENBAUM:

Q. After –

MR. LOEBS: Are you done with this?

MR. NISENBAUM: I may come back to it.

MR. LOEBS: I just don't want to have something distracting her from answering your question.

MR. NISENBAUM: No problem.

Q. After you order – or strike that.

After Ms. Sheehan slammed her door closed, from that point onward, did you expect that Ms. Sheehan would follow whatever orders you gave her?

A. I had hoped that I could verbally communicate with her. Once the door was closed, that took it to a completely different level because she had just tried to stab us. And at that point it was pretty clear that she probably wasn't going to comply with any verbal commands. But you always hope that as an officer that you can talk your way out of a situation and be respectful and compassionate. So I didn't throw those tools out the door, but –

* * *

[234] Q. After you had fired the second round at Ms. Sheehan, Ms. Sheehan was no longer coming towards you, correct?

MR. LOEBS: Object. To the question as argumentative in that her testimony is that she couldn't – she's not sure whether she fired two or three rounds.

THE WITNESS: Yeah. I don't know how many rounds I fired. It's between two and three. So when you get specific about the second shot, it's hard for me to be definitive.

BY MR. NISENBAUM:

Q. Before you fired the last shot, Ms. Sheehan had stopped coming towards you, correct?

A. No. Ms. Sheehan was still aggressively standing there with the knife in her hand facing me when I fired the last shot.

Q. She had stopped coming towards you, however, correct?

A. I believe that she possibly was coming towards me in a sense, because I remember her head going down.

Q. Okay. Now, I want you to look at page 21, lines 5 through 18 of your MCD statement.

A. Okay.

MR. LOEBS: 5 through what? 21?

[235] MR. NISENBAUM: 21, 5 through 18.

MR. LOEBS: So 5 through 18. 5 through – okay.

THE WITNESS: Okay.

BY MR. NISENBAUM:

Q. Okay. Reading that, you told MCD that Ms. Sheehan basically froze, meaning she didn't drop the weapon. She was still standing, but she wasn't coming at you anymore; is that right?

A. No. Because I – if you look at line 16, I say, "I don't mean freeze. She's not coming on me anymore. But she doesn't drop the weapon."

Q. So what do you mean by freeze? What did you mean by freeze when you said that?

A. I think there was a pause in her – it was like a – a reaction to the round being in her. But it wasn't – wasn't like she just stood there and froze, you know what I mean. There was still movement in her body, still movement. And the last round she's still leaning towards me.

Q. Now, Ms. Sheehan was taller than you, correct?

MR. LOEBS: Objection. Asked and answered.

THE WITNESS: I believe we talked about that earlier. I think she's like 5'5 or something.

[236] BY MR. NISENBAUM:

Q. Okay. And how far was she from you when you fired the last shot?

A. Three to four feet.

Q. Okay. And how far was the gun from – and the last shot I think you described went into her head, correct?

A. Yes.

Q. Okay. And how far was the gun muzzle from Ms. Sheehan's head when you fired the last shot?

A. Two to three, maybe four.

Q. Two to three, maybe four what?

A. Feet.

Q. Feet. Okay. Now, I think you testified earlier that – that you moved Officer Holder from – after the – after the shooting, you moved Officer Holder; is that correct?

A. Well, I helped her, yes.

Q. You helped her?

A. Yeah.

Q. And was that after Officer Zachos had kicked the knife?

A. Yes.

* * *

[250] Q. Was Ms. Sheehan's psychiatric disability a – a factor in your order to give – in your order to Officer Holder to force Ms. Sheehan's door open?

MR. LOEBS: Object that the question assumes facts in terms of psychiatric disability and it's vague.

THE WITNESS: If you're wording it that way, I don't believe specifically that I can say I thought at that moment when I authorized and instructed Officer Holder to open the door about her psychiatric disability.

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

– – o0o – –

TERESA SHEEHAN, Plaintiff, vs. CITY AND COUNTY OF SAN FRANCISCO, et al. Defendants.	No. C09-03889-CRB

Video Deposition of
TERESA SHEEHAN
November 15, 2010
Volume II

Reported by:
James Matthews, CSR 7916

TOOKER & ANTZ
COURT REPORTING & VIDEO SERVICE
350 SANSOME STREET, SUITE 700
SAN FRANCISCO, CALIFORNIA 94104
(415) 392-6050

* * *

[66] Q. So tell me what – tell me how did you realize that the police were there? The day of this incident?

A. They said open up this is the police.

Q. Okay. Do you remember?

A. They told me their names.

Q. What – do you remember what they said their names were?

A. Officer Reynolds and Officer Holder.

* * *

[67] Q. Okay. Now, what were their words as well as you can remember? Their first words to you through – now let me actually step back. Were their first words to you through your closed door?

A. I don't remember what they were. All I know is they identified themselves as police and they told me to come out. And when I wouldn't come out they said we're here to 5150 you or something. And I didn't need that procedure to happen to me.

Q. Did they use the word 5150?

A. Yes.

Q. Okay. And they used that word to you?

A. They said it to Heath Hodge and he said yes.

Q. Okay. So you heard a conversation between them and Mr. Hodge?

A. And they said – I think they weren't sure about 5150, the procedure, but they were adamant about trying to break in.

Q. With Mr. Hodge?

A. No. They told Mr. Hodge to leave. They called up for backup.

Q. Now, what – but then when the officers spoke with you, what did they say to you through the closed door?

[68] A. That I had to come out.

Q. Did they tell you that they were there to help you?

A. I don't remember.

Q. And when the officers said to you that you had to come out what did you do?

A. I told them there was no reason. They didn't have a search warrant for my room. They didn't even belong in the co-op. And they also didn't have a subpoena for me to come out and talk to them so I didn't go out to talk to them. It was – they need to subpoena me if they want me to come out to talk to them because I hadn't broke any rules or laws with the City and County of San Francisco.

Q. So when they said they wanted to help you did you not believe them?

A. I don't know.

MR. NISENBAUM: Objection.

THE WITNESS: If they said that.

MR. NISENBAUM: Objection, calls for – assumes facts not in evidence.

THE WITNESS: I don't remember. I wasn't interested in being cooperative because the other two times when I had cooperated with the police had resulted in the concussion on my head against the police vehicle, and the other time when I had been taken to the station by a policeman when I was carrying a knife, I was armed, then one [69] of the police women in the police station after they brought me in for questioning wrenched my right arm and hurt it.

MR. KEITH: Q. When did that happen?

A. I'm not sure. It was after I had been – discharged from the incident of the concussion against the police vehicle. And they asked me did I have any weapons. It was one man in the police car. I don't remember his name. I just remember he looked oriental. Or Hawaiian or something. Asian a little.

Q. Are you now talking about a different incident?

A. A second incident. Right. The second time they picked me up.

Q. Okay.

A. And then I said I have a knife. In my bag. And he said did I have any money and I said yes. And then I gave him the knife and all my possessions when they took me into the station.

Q. So I want to get back to the date of this incident.

So were you concerned that the police officers who came there were going to hurt you if you came out of the room?

A. Yes.

* * *

[71] Q. So you were concerned that Officer Holder and Sergeant Reynolds were going to take to [sic] you General Hospital against your will?

A. True. True.

Q. Okay. And – and is that why you didn't open the door for them?

A. True.

Q. And then eventually did they open the door?

A. No. Eventually I opened the door. But this is after they threatened me saying they were calling for backup. Because when the backup came I didn't know who they were. They didn't identify themselves.

Q. Okay. So then after – after Officer Holder and Sergeant Reynolds initially told you to – to come out it was you who opened the door initially, not them; is that correct?

A. That's correct.

Q. Okay. And when you opened the door what did you say to them?

A. I said I have a knife. Or – I was holding my knife then because when – after they had called for backup I [72] looked out the back when no one came. I just got my knife.

Q. Okay.

A. From where, you know, I had been eating where I had been staying. And I just showed them I have a knife.

Q. Okay. And you said to them I have a knife?

A. Yeah. And I showed them. I opened the door. I said go away or something like that. Leave me alone. I have a knife.

I used to have a knife before but the police department never returned my knife. It was confiscated on my second arrest and they never returned it.

The first time they had returned it.

* * *

[73] Q. Oh, ma'am, I was asking you where that knife was in your room before you picked it up and showed it to the officers.

A. Well, I purchased that knife for slicing bread. I used to buy the big Safeway French bread and I cut the bread because it's not presliced.

* * *

[74] Q. So it sounds like you had some other utensils in the room as well?

A. Fork, knives, spoons.

Q. And that the particular knife that you picked up and showed to the officers –

A. I purchased that at Safeway.

Q. Okay. But the particular knife that you picked up and showed the officers, why did you choose that particular knife to show the officers?

A. Because I –

[75] MR. NISENBAUM: Vague.

THE WITNESS: If I had shown then [sic] my dinner fork cutting knife they would have laughed at me.

MR. KEITH: Q. So you purposely chose a larger knife.

A. Yes.

Q. And was that to make a point to them –

A. Yes.

Q. – that they needed –

A. That they shouldn't harass me and they shouldn't try to threaten me.

Q. And did you tell the police –

A. And also it was to show them that it was inequitable. I knew a gun would harm me more than

a knife. A knife could scar me up. But – a gun could kill me.

Q. So you wanted to show them a knife because you thought it was inequitable that they had guns?

A. Not really that. Mostly it's from the right to bear arms in the Constitution.

Q. So you felt that it was your legal right to show the officers a knife?

A. Right. I also thought it was in good judgment to show them so they would back off and leave me alone.

Q. So your goal in showing them the knife was to – to make them recognize that they needed to get away from you?

[76] A. Right.

Q. Did you – did you say to the officers you don't have a warrant?

A. Yes. You don't have a warrant. You don't have a – you can't search my room. And also that you need to subpoena me. But I didn't say you need to subpoena me. I just said you don't have a subpoena.

Q. Yeah. And –

A. So I wasn't coming out to discuss anything with them.

Q. And this is something that you said to them while you were showing them the knife?

A. No, it was when the room was closed and locked.

Q. Oh.

A. And then during the time when they were trying kick it down. I just kept on repeating and – to go away.

Q. Now, ma'am, you mentioned a couple of times that there was a time when the officers were trying to kick down the door. Was that – was that a little bit later in this incident after you first opened the door and showed them the knife?

A. No, it was previous.

Q. Okay. What was the order in which these things happened?

A. They identified themselves. Then they tried the [77] key when I wouldn't open the door. And then they started kicking the door.

Q. Did the officers successfully open the door with the key?

A. No. They almost did but then I turned it back.

Q. But then you mentioned that there was a point at which you opened the door and showed the, officers the knife. When did that happen? Was that after the officers tried to kick down the door or before the officers tried to kick down the door?

A. Afterwards.

Q. Okay.

A. After they had called for backup. I didn't hear or see any other people for backup until after they shot me. And I had collapsed.

Q. Now I wanted – so the first time that the officers – so then the first time the door opened was it because the officers opened the door?

A. No.

Q. Okay. The first time the door opened was because you opened the door?

A. Yes.

Q. Okay. So when the officers were kicking on the door were they successful in kicking it open?

A. No, it's a heavy wooden door.

[78] Q. Okay. So when the door ultimately did open it was because you opened it?

A. Yes.

Q. Okay. And that's the point at which – so that's the first time the door opened and then you saw the officers?

A. Right.

Q. And at that point you showed them the knife?

A. Yes. And then I looked at their faces. Both of them.

Q. What did you see about their faces?

A. I wanted to recognize them. In case I had to make a – I had to testify and identify them. I didn't know their badge numbers. I couldn't tell because the hallways were a little bit dark.

Q. Were you concerned that if they took you to General Hospital that you would be tortured at General Hospital?

A. No, but I thought I would be detained and hospitalized, and I didn't want to be detained and hospitalized. On the fact that I wasn't in my right mind. Because I was. I was functioning life well enough, and I didn't want them disturbing me and hospitalized me at a cost to the taxpayers and cost to myself.

Q. Were you concerned that if you were brought to General Hospital that you might be forced to take medication against your will?

[79] A. True.

Q. Is that one of the reasons why you showed the officers the knife, to prevent that from happening?

A. No. The reason I showed them the knife was to have the right to bear arms in the Constitution. I'm a citizen.

Q. So when you showed them the knife was part of your concern that if they did get you that you'd be taken to General Hospital and have to take medicine involuntarily?

A. True –

MR. NISENBAUM: Objection, compound.

THE WITNESS: They didn't know what to do. And Heath Hodge was saying 5150 me. Take me to the psych ward. Psych crisis center at General Hospital. And I had been there before and they had found that I didn't need to be hospitalized for anything mental.

MR. KEITH: Q. Now, ma'am, were you on the bed when the door first opened? To the police officers?

A. No. The bed was further in. It's about halfway in between the windows – the windows are a little bit – on the other wall. Facing the door.

Q. So do you recall then when the door first opened to the police officers that you were actually standing at the door?

A. I was standing at the door because there's also a – an adjacent chest of drawers, a bureau. A low chest of [80] bureau drawers at one end of the bed.

Q. And you remember standing next to that when the door was opened?

A. I was standing close to that when I opened the door. I didn't open the door all the way.

Q. Okay. Now, about how many inches did the door open?

A. So they could see my full body and that no one else was in the room with me.

Q. So about a foot or so? Foot and a half?

A. Yeah. About two feet.

Q. Okay. Two feet.

A. And then I think they later went in to search the closet to see if there was anyone there but there was no one in the closet as well.

Q. So was there a point where you were pepper sprayed by the police officers?

A. Yes.

Q. Okay. How long after you showed the officers the knife were you pepper sprayed?

A. I don't know. I think I took one step with the knife upheld. I didn't point the knife at anyone.

Q. So when you say with the – so when you were holding the knife you were kind of holding it straight up and down?

[81] A. I took one step. I was on the threshold of the door.

Q. Then you stepped out towards the officers?

A. I was in the room, I stepped my foot on the threshold. I had my knife upraised with my right hand. Because that's my stronger arm.

Q. Okay. And then at that point did the officers then pepper spray you?

A. Yes.

Q. Okay.

A. And then I screamed at them. You're blinding me, you're blinding me. I can't see. And then I started to – I started to fall. And they right away were shooting me. I started to come out the door because I was blinded. I had my knife in my hand. I raised my – I was wearing my glasses. And I started to raise my other arm. And then the shots happened.

Q. Okay.

A. And then I fell against the wall in the corridor. Close to the kitchen door. The kitchen –

* * *

[82] Q. Okay. And so you mentioned that after – that after you were – after you were shot you kind of moved into that vestibule area?

A. I moved towards it but I went against the wall.

Q. Okay.

A. There's a little wall space and then I fell down [83] from the wall. I collapsed with my back to

the wall. And then I ended up curled up in the corridor – not exactly straight. I didn't collapse and bump my head then.

Q. Okay.

A. I just slide – I slided down the wall into a – down, position.

Q. Did an officer kick your hand?

A. Yes. They kicked the knife away from my hand.

Q. Tell me how that happened.

A. I don't know who did it.

Q. You didn't see the face of the officer who did that?

A. No. I was bleeding and I was – like that.

Q. And he kicked the knife out of your hand?

A. I could feel it, yes. I don't know who did it.

Q. Okay. At that point could you see what was going on?

A. I opened my eyes. I – and then I looked down and I was bleeding. I said I'm dying, and I said quietly a prayer. A couple prayers to myself.

Q. Were you already kind of slumped down on the ground –

A. Yes.

Q. Let me finish my question. Were you already slumped down on the ground when the officer kicked the knife [84] out of your hand?

A. Yes.

Q. Okay. And do you remember that hurting your hand?

A. I felt it. But it wasn't too bad.

Q. Okay. When you stepped outside of your room, what were you planning to do?

A. I didn't know what I was planning to do. I thought they would wrench my arm and disarm me – disarm my hand and then with the two of them they could cuff me. Handcuff me in front. But they didn't do that.

Q. Why didn't you drop the knife?

A. This is my knife. They didn't drop their guns. They didn't even drop the guns after they shot me.

Q. So you felt that it was your right to have the knife?

A. Yes.

Q. And you felt that you were justified to be holding that knife?

A. Yes.

Q. Against them?

A. Yes.

Q. Why?

A. Because I have the right to bear arms.

MR. NISENBAUM: Belated objection, asked and answered.

[85] MR. KEITH: Q. Did you tell the officers to get out of there?

MR. NISENBAUM: Objection, vague.

THE WITNESS: Not after I was shot.

MR. KEITH: Q. I'm sorry. Before you were shot did you say get out of here to the officers?

A. I told them to go away. Leave me alone.

Q. Did you tell them I don't need your help?

A. Yes.

Q. Did you tell them I'm going [sic] kill them?

A. I didn't say I am going to kill them.

Q. Okay. So that you didn't say?

A. No, I don't think so.

Q. Well, did you –

A. I may have said it – but I didn't – I knew I couldn't kill both of them with one knife.

Q. Okay.

A. Against two guns.

Q. So I guess in your own mind you weren't actually planning to kill them? Is that fair?

A. I wasn't planning to kill them, no.

Q. Did you say that to them, though? That I'll kill you?

A. I planned to resist arrest.

Q. I just want to know what you said to them, not what [86] your own plan was. I want to know what you actually said to the officers. Did you tell them I'll kill you if you don't get out of here?

A. Yes,

Q. And then did you have a raised voice when you said that?

A. Yes. So they could hear me on the other side of the door clearly.

Q. Okay. So after the door opened did you tell them again that – get out of here or I'll kill you?

A. I'm not sure if I told them a second time. I was just distraught at that point. I was emotionally upset. I saw the guns and I saw there was two against one and I knew this was just a bread cutting knife. I knew it wasn't a lethal weapon.

Q. Now you mentioned – you had already mentioned through the closed door that you were armed.

A. Right.

Q. And you recall then when you – when you came out with the knife you saw them with the guns?

A. Yes. I didn't come out. I just opened the door first.

Q. Okay. So when you opened the door and were holding the knife you saw them with their guns?

A. Yes.

[87] Q. Then did you get pepper sprayed shortly after that?

A. Yes. They didn't tell me to drop the knife.

Q. Okay.

A. They just proceeded to kill me I think. Shoot me. Or if they did tell me drop the knife I said I don't have to.

Q. Okay. Do you remember one way or the other?

A. No.

Q. Whether they told you to drop the knife?

A. I'm not sure. It's been so many months I don't remember exactly.

* * *

[100] Q. Now, you mentioned earlier that you were – that you were praying after –

A. Yes.

Q. – you were shot?

A. Quietly to myself.

Q. And then you just mentioned something about consciousness, but I don't recall –

A. I lost consciousness for a few minutes. My eyes closed and I – I don't know how long it was. It may have been a minute or two, or half a minute, I'm not sure.

Q. Was that after the knife was kicked out of your hand or while you were waiting for the paramedics?

A. When the knife was kicked out of my hand my eyes were closed. I was waiting for the ambulance and paramedics. And then I opened my eyes. And I saw one of the officers by the door of my room. And then the officer that was by the vestibule at the kitchen door and the other room, she was told to move out of the way. Then the knife was there on the ground. I don't know if she kicked it away or Frank Grist [101] kicked it away or if Sergeant Reynolds kicked it away. I don't know who kicked it away.

Q. After it was on the ground –

A. Because my eyes were closed from the pepper spray.

Q. Right.

A. I thought it was mace but they said it was pepper spray.

Q. So when you mentioned it being kicked away is that after it was kicked out of your hand and on the ground it was then kicked a second time to be kicked away?

A. I don't know. I think they just left it out of my reach and they moved – they moved me towards the – the litter to carry me down to the ambulance.

Q. So at what – so did you lose consciousness at any point along what we've been talking about? I'm just trying to get a sense if you did and if you did when you did.

MR. NISENBAUM: Objection, calls for speculation.

THE WITNESS: My eyes closed.

MR. KEITH: Q. But your eyes could be closed without losing consciousness, right?

A. Right.

Q. So did you lose consciousness?

A. I may have a little, but not much.

* * *

[105] Q. You were first pepper sprayed and then you were shot after that, correct?

A. She pepper sprayed me with one hand and she had the gun up raised and started shooting me with the other hand. There was not much time between.

Q. Okay. What did you do in between being pepper sprayed and being shot?

A. I was just standing there with my knife up raised.

MR. NISENBAUM: Objection, argumentative.

MR. KEITH: Q. Okay. Why didn't you drop the knife after you were pepper sprayed?

MR. NISENBAUM: Objection, argumentative.

THE WITNESS: My knife – my hand grabbed it. The pain.

MR. KEITH: Q. The pain prevented you from dropping the knife?

A. Well, it was my knife. I didn't want to stab myself. There was no scabbard to it.

Q. Did you understand that you were holding the knife that the officers could perceive that as a threat to them?

A. I could understand that.

Q. Did you choose not to drop the knife after you were pepper sprayed?

A. I don't know. I have no recollection of that.

Q. Okay. But you didn't drop it?

[106] A. I didn't drop it. I didn't know what they were going to do to me after I was shot.

Q. I was talking about after you were pepper sprayed.

A. True. I didn't know what they were going to do with me.

MR. NISENBAUM: And objection, argumentative. Given the testimony.

MR. KEITH: Q. Why didn't you drop the knife after you were shot?

A. Why? In case they wanted to like stomp me or beat me with their boots or their clubs, with the butt of their guns.

Q. So you – so after you were shot you held on to the knife because you –

A. Yes.

Q. Because you intended to continue to defend yourself?

A. If I needed to. And then the knife was kicked out of my hand. I heard them – I heard one of the people I think Sergeant Reynolds said move to Officer Holder, and then I don't know who said – or who kicked the knife out of my hand. Just said get the knife, and Officer Holder, I don't think she got the knife. And then I think Sergeant Reynolds may have, or Frank Grist may have kicked the – I think Officer Holder didn't do it. I think it was –

[107] Q. The backup officer?

A. No. I think it was Sergeant Reynolds kicked the knife out of my hand. My right hand.

Q. Earlier –

A. But I don't know. I didn't look and see.

* * *

[116] Q. Okay. So you mentioned that you heard six shots.

[117] A. I heard six shots.

Q. Okay.

A. Succinct shots.

Q. Were you still standing when you heard those six shots?

A. I was standing and then as I fell against the wall I may have heard the last one. I'm not sure.

Q. Okay. So when you were against the wall you may have heard the last shot?

A. Yes.

* * *

James L. Norris
CONSULTANT IN FORENSIC SCIENCE
555 Twin Dolphin Drive, Suite 165
Redwood City, CA 94065
(650) 799-6390
Forensic@Jim-Norris.com

Examination Report

Re: Teresa Sheehan vs. City and County of San Francisco, et al.

I have read the following documents and viewed the following photographs in connection with this matter:

- San Francisco Police Department Incident Reports
- Photographs of the scene of the shooting taken by members of the San Francisco Police Department
- Photographs of Ms. Sheehan's wounds
- San Francisco Police Department Crime Scene Investigations Unit reports and diagrams
- A San Francisco Police Department Chronology of Investigation for this matter
- A San Francisco General Hospital Emergency Department Medical Report for Ms. Sheehan
- Trial testimony of myself in the case of the People v. Sheehan

Analysis and Conclusions:

1. **With respect to the wounds to Ms. Sheehan:**

Ms. Sheehan had the following bullet strikes: (The numbers refer to the number of wounds that would have been created.)

The wound to her left face (2)

A through and through left breast wound (2)

A through and through right breast wound (2)

A right axillary (aka armpit) wound (1)

A through and through right arm wound (2)

A left lower groin wound (1)

A superficial wound to her right upper abdomen (1)

That total is eleven wounds, which is the same as was determined at the San Francisco General Hospital Emergency Department.

Five shots were fired. There are four through and through wounds:

Face
Left Breast
Right Breast
Right Arm

The right armpit wound is likely associated with the right arm wound.

The left groin wound would be the fifth wound.

Note that if the right armpit wound is associated with the right arm wound, then her right arm was probably not raised when the wound has [sic] created. From an examination of the photographs of her wounds, the right arm wound appears to be in her upper arm.

The following scenario is consistent with the observed evidence: Officer Holder inflicted the right and left breast wounds (or substitute the groin wound for one of the breast wounds) while Ms. Sheehan was coming straight on and then the right arm wound when Ms. Sheehan turned to the side.

If Officer Holder is firing from the hip, she is unlikely to have inflicted an essentially level wound to Ms. Sheehan's right arm if Ms. Sheehan is standing erect.

If Ms. Sheehan had been shot from the front, you would have expected the through and through wounds to exit in the back. The San Francisco General Hospital Emergency Department specifically looked at her back and there were no wounds.

The head wound seems to have occurred when Ms. Sheehan was no longer standing.

The arm/armpit wound is inconsistent with Ms. Sheehan holding a knife above her head in her right hand.

The other through and through wounds are consistent with striking her from the side, not from straight on.

Ms. Sheehan also appears to have a "superficial" wound in the photos taken by her brother. One possibility is a grazing wound, possibly from the bullet that exited her mouth.

2. With respect to the firearms used and the number of shots that were fired:

Two semiautomatic pistols were used in the incident, each belonging to one of the officers. Both are .40 caliber SIG Model P229 semiautomatic pistols. The serial numbers are: AM 17 797 and AM 24 078.

The contents of the magazines used in these pistols were as follows:

A fully loaded magazine for these weapons contains 12 rounds. One round could also be in the chamber of each officer's pistol, so they could be loaded with 13 rounds. Often, though, the 12 round magazine would be inserted and one round racked into the chamber, leaving 11 in the round magazine would be inserted and one round racked into the chamber, leaving 11 in the magazine. If we assume that's what was done in this matter, we have:

SIG 17 797 is recovered with a magazine that contains 9 rounds, so that officer fired 3 rounds

SIG 24 078 is recovered with a magazine that contains 10 rounds, so that officer fired 2 rounds

There were five expended cartridge casings were [sic] recovered at the scene.

3. With respect to the photographs of the crime scene:

There is a large blue plastic container present at the crime scene. This container has apparent high velocity blood spatter on it. None of the other objects near the blue container appear to be bloodstained.

An expended projectile was found in the room with the blue container. This bullet had expanded (mushroomed).

A pistol magazine containing unfired cartridges and an expended cartridge casing were found near the blue container.

These findings are consistent with a shot being fired and Ms. Sheehan being struck by a bullet near this location.

A copy of my resume is attached to this report. A copy of the scene diagram prepared by the San Francisco Police Department and modified by me is attached to this report. I am being paid $200 an hour for my services in this case. A list of other cases in which I testified as an expert at trial or in deposition in the preceding four years is also attached. Exhibits that I may use during any testimony that I may give in this case include: all the photographs taken by the San Francisco Police Department, and the photographs of Ms. Sheehan's wounds; the scene diagram prepared by the San Francisco Police Department and modified

by me; wooden dowels; and articulated models of the human figure.

/s/ James L. Norris
James L. Norris
Consultant in Forensic Science
December 10, 2010

James L. Norris
CONSULTANT IN FORENSIC SCIENCE
555 Twin Dolphin Drive, Suite 165
Redwood City, CA 94065
(650) 799-6390
Forensic@Jim-Norris.com

Cases Testified in at Trial and at Deposition in the Last Four Years December 2010

10/06 – U.S. v. Diaz, et al. – San Francisco Federal Court
3/07 – People v. Barber – San Mateo County Superior Court
6/07 – People v. Lopez – San Joaquin County Superior Court
7/07 – People v. Gans – San Francisco County Superior Court
8/07 – Mahach-Watkins v. Depee – San Francisco Federal Court
11/07 – People v. Peterson – San Mateo County Superior Court
12/07 – People v. Abuweik – San Francisco County Superior Court
2/08 – People v. Shea – Contra Costa County Superior Court
5/08 – People v. Creech – Napa County Superior Court

6/08 – People v. Powe – Contra Costa County Superior Court
9/08 – People v. Kenney – Monterey County Superior Court
10/08 – People v. Powe – Contra Costa County Superior Court
12/08 – People v. Sheehan – San Francisco County Superior Court
12/08 – People v. Soun – San Francisco County Superior Court
12/08 – People v. Binkley – Santa Clara County Superior Court
3/09 – People v. Mavromatis – San Francisco County Superior Court
5/09 – U.S. v. Nolan – San Francisco Federal Court
6/09 – People v. Leonard – Sutter County Superior Court
6/09 – People v. Greisa – Yuba County Superior Court
9/09 – People v. Louvier – San Francisco Superior Court
9/09 – Grosshans v. Gass et. al – Sacramento County Superior Court
10/09 – People v. King – San Mateo County Superior Court
12/09 – People v. Floyd Jackson – San Francisco Superior Court
1/10 – People v. Sean Mooney – Sonoma County Superior Court
5/10 – People v. Michael Croslin – San Francisco Superior Court
8/10 – People v. McDowell – San Francisco Superior Court
9/10 – People v. Nguyen- San Francisco Superior Court
9/10 – People v. Harris – San Francisco Superior Court
10/10 – People v. Smith – San Francisco Superior Court
11/10 – People v. Smith – San Francisco Superior Court

Curriculum vitae: James L. Norris

•Current Employment

Consultant in Forensic Science
555 Twin Dolphin Drive, Suite 165
Redwood City, CA 94065
(650) 799-6390
(650) 851-7229 (Fax)
Forensic@Jim-Norris.com
www.Jim-Norris.com

•Education

Bachelor of Science, *magna cum laude,* Chemistry, California State University, Fresno Master of Science, Chemistry, University of California, Berkeley

•Professional Employment

1995 to 2004 *(Retired)* – Director, San Francisco Police Department Forensic Services Division

Responsible for the overall management of the Forensic Services Division which includes the Criminalistics Laboratory, Crime Scene Investigation Unit, Photography Section, Polygraph Unit, Computer Analysis Unit, Forensic Art Unit, and the Identification Bureau.

1987 to 1995 – Senior Criminalist, San Francisco Police Department Criminalistics Laboratory

Responsible for the supervision of the Criminalistics Laboratory and the analysis of physical evidence in complex cases. Testimony in the Municipal, Superior and Federal District courts as an expert witness in several areas of forensic science, including firearms identification, ballistics, crime scene reconstruction,

trace evidence examination, and the effects of alcohol on human behavior and driving performance. Supervision of the narcotics analysis, firearms and tool marks, questioned document, trace evidence, arson, forensic serology, and DNA programs. Responsible for the Forensic Alcohol Program.

1974 to 1987 – Criminalist, Santa Clara County District Attorney, Criminalistics Laboratory

Assigned to the major case section of the laboratory, which involved the analysis of physical evidence in violent crimes. Testimony in the Municipal, Superior courts as an expert witness in several areas of forensic science, including firearms identification, ballistics, crime scene reconstruction, forensic serology, trace evidence examination, and the effects of alcohol on human behavior and driving performance.

1970 to 1974 – Criminalist, San Mateo County Sheriffs Office Crime Laboratory

Analysis of physical evidence and testimony in the Municipal, Superior courts as an expert witness in several areas of forensic science, including firearms identification, ballistics, crime scene reconstruction, forensic serology, narcotics analysis, and trace evidence examination.

•Certification

Forensic Alcohol Supervisor, Santa Clara County, 1978 to 1987

Forensic Alcohol Supervisor, City and County of San Francisco, 1987 to 2004

Administrator and Person Responsible for Forensic Alcohol Analysis for the San Francisco Police Department, 1995 to 2004

•Professional Associations

California Association of Criminalists *(Past President, Regional Director, Editorial Secretary and Membership Secretary)*

American Academy of Forensic Sciences

California Association of Crime Laboratory Directors

Law Enforcement Video Association (LEVA)

•Professional Activities

Member, Users' Advisory Board, California Criminalistics Institute *(Representing the California Association of Crime Laboratory Directors)*

Instructor in Homicide Investigation, California State University, San Jose

Instructor in Sexual Assault Investigation, California State University, San Jose

Instructor in Property Management, California State University, San Jose

Instructor in the effects of alcohol on human behavior and driving performance and the ability of subjects to perform field sobriety tests, San Francisco Police Department Academy

Consultant in Alcohol Impairment, Pacific Gas and Electric Company, Nuclear Division

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN
DISTRICT OF CALIFORNIA**

TERESA SHEEHAN,

Plaintiffs,

v.

CITY AND COUNTY OF SAN FRANCISCO, et al.,

Defendants,

/

Civil No. 08-1415 (DRD)

PRELIMINARY EXPERT REPORT OF LOU REITER

1. My name is Lou Reiter. I have been actively involved in police practices and law enforcement since 1961. I was an active police officer for 20 years. Since my retirement in 1981 as an active police officer, I have been involved in police and law enforcement practices as a private police consultant

2. Since 1983 I have been providing law enforcement consultation in police training and management to provide law enforcement training in the following areas:

    - investigation of critical incidents – officer involved shootings, use of force, and pursuits.
    - Managing the Internal Affairs function.
    - Police discipline.

- Use of force and deadly force issues.
- Police pursuit issues.
- Investigative procedures and supervision.
- Jail intake procedures
- Personnel practices.
- Supervisory techniques
- Crowd control procedures.
- Liability management.
- Policy and procedure development.
- Management effectiveness.

I consult with police departments of 3 to 39,000 employees, performing internal audits for the police organization. My primary areas of focus during these audits are:

- Citizen complaint procedures.
- Discipline, internal affairs and early warning systems.
- Personnel practices including selection, hiring, EEOC/AA, promotion, assignment and retention.
- Specialized operations including traffic, investigations, narcotics, vice, intelligence, emergency response teams and unusual occurrence units.

- Organizational structure and command responsibilities.
- Police department governance.
- Policy and procedures development.
- Use of force policy and procedures.
- Investigation of critical incidents.

3. Since 1983, I have been retained in over 1000 police related cases. This involvement has been on a mix of approximately 2/3 plaintiff and 1/3 defense. Assistance provided includes case analysis and development and expert witness testimony. I have been qualified in state and Federal Courts, including the District of Columbia and Puerto Rico, to provide trial testimony in many areas including:

   - Field procedures including tactics, arrest techniques and pursuits.
   - Standards of police misconduct investigations.
   - Use of force and deadly force.
   - Supervision.
   - Investigative procedures.
   - Jail intake procedures
   - Police management and personnel practices.
   - Investigation of citizen complaints and discipline.

- Police policy and procedures development.
- Police training.

4. I am a former Deputy Chief of Police of the Los Angeles Police Department. I served as a police officer in the Los Angeles Police Department for over twenty years until I retired in 1981. During that period of time I served as a patrol and traffic officer, supervisor, manager, command officer and executive staff officer. I was involved in police training, investigating allegations of police misconduct, Chairman of the Use of Force Review Board, member of the Unusual Occurrence Command Post Cadre, and researcher and author of the chapters on internal discipline, training and management/employee relations for the Police Task Force Report of the National Advisory Commission on Criminal Justice Standards and Goals. In 1993 I published the manual/guide Law Enforcement Administrative Investigations; the Second Edition in 1998, and the current Third Edition in 2006.

5. My experience, training and background is more fully described in the attached resume. A complete list of my testimony during the past four (4) years is attached.

6. I have reviewed the following materials to date regarding this case:

- Complaint
- Interrogatories and responses

- Transcript of Ms. Sheehan's Preliminary Hearing (2 days)
- Depositions
  - Officer Katherine [sic] Holder
  - Sgt. Reynolds, retired
  - Officer E.R. Balinton
  - Sgt. Mitchell Campbell
- Medical Records of Ms. Sheehan
- SFPD Roll Call Lesson Plans
  - Hostage and Barricaded Suspect Incidents 1-2
  - ADA
  - Exigent Circumstances – Forcible Entry
  - Interacting with People with Disabilities
  - Search and Seizure, "Knock and Talk"
- SFPD Psychological Evaluation of Adults (3 parts)
- Police Crisis Intervention Training
- Communications Techniques and Non-Violent Crisis Intervention
- SFPD Training documents regarding ADA
- SFPD General Orders

- 5.01 "Use of Force"
- 5.02 "Use of Firearms"
- 6.14 "Psychological Evaluation of Adults"
- 8.02 "Hostage and Barricaded Suspect Incidents"

- POST Domain 37 and 20 and work-books
- Declaration of Lt. Simon Silverman regarding police document confidentiality
- SFPD police reports officer shooting incident
- Witness and of statements
- CAD documents
- Disks of investigative documents and materials
  - Dispatch
  - Crime Scene Log and CSI reports
  - Booking
  - Criminal History
  - Criminal Court and Prosecution documents
  - Toxicology report
  - Transcripts of interviews

- Use of force log
- Training documents and lesson plans

7. These opinions are based upon the totality of my specialized knowledge in the field of police practices. This experience is derived from my personal police experience, knowledge and training. This expertise has been developed during my 49 years involvement in law enforcement at all various capacities as a practitioner and my continued experience as a trainer, auditor and litigation consultant. This experience has provided me with extensive personal and specialized training, experience and knowledge of police operations and generally accepted police practices. The body of knowledge that I have reviewed over the years coupled with my personal and professional experiences, my continued auditing of police agencies, my constant training of police supervisors, managers and executives, my continuous interaction with other police professionals, organizations and training personnel, all form the foundation for the opinions I am rendering in this matter.

   There is a large body of knowledge and literature about the practices and standards that modern, reasonably managed and administered police agencies across the U.S should follow and apply to its operations. These generally accepted practices have developed over time to encourage and assist police agencies to deliver police services to communities serviced which are professional, reasonable, effective and legal. Many of these generally accepted practices have been developed

from law enforcement critical analysis of field incidents and examinations of incidents reported to cause police liability, deficiencies and employee misconduct. These generally accepted practices have been a response to reported cases of police misconduct and liability and a desire by law enforcement to create a system to ensure that police conduct remains within acceptable legal and constitutional bounds. I am familiar with this body of knowledge and through my continuous training and audits assist law enforcement with this requirement for reasonable and legal police response to field incidents and for constant improvement.

My examination of the factors involved in this police practices incident embodies the basic fundamentals which I employ in my professional examination of police agencies during my audits and when working as a consultant with the U.S. Department of Justice. My opinions are provided with a reasonable degree of certainty within the fields of law enforcement, police activity and police administration and supervision.

The terminology I use in my Expert Report is not meant to invade the purview of the court or the final jury determination. I use these terms in my training of police supervisors, managers and command officers when instructing on administrative investigations and civil liability. These are products of my continuous review of case law which should guide a reasonable police agency in supervising its employees. These terms have become common terms within law enforcement supervision, management and risk management;

just as the terms of probable cause, reasonable suspicion and the prima facie elements of crimes have become common terminology for police field personnel and detectives.

8. It is my understanding from my review of the above documents that the following incident occurred resulting in this litigation: On August 7. 2008, Ms. Teresa Sheehan was residing in an independent cooperative housing program for persons who suffered from chronic mental illness. Ms. Sheehan, 56, is diagnosed with schizoaffective disorder. Persons residing in these private residences are supervised by a social worker, Heath Hodge. On this date, Mr. Hodge entered Ms. Sheehan's private apartment with the use of a key he obtained from the property manager. Mr. Hodge called the police when he alleged that Ms. Sheehan ordered him to leave and threatened that she would obtain a knife. Officer Holder and Sergeant Reynolds responded. These officers entered Ms Sheehan's private apartment twice and discharged their service weapons resulting in serious gunshot wounds to Ms. Sheehan.

9. This preliminary expert report will address three (3) major issues of generally accepted police practices: (1) dealing with emotionally disturbed, diminished capacity persons; (2) forcible entry into a private residence; and (3) use of deadly force.

10. **Officer Holder and Sgt. Reynolds made a conscious choice in their failure to use reasonable and generally accepted police practices for dealing with Ms. Sheehan, someone**

they knew to be suffering from a mental illness and acting in a manner that any reasonable officer would have known indicated that she was functioning in a diminished capacity.

11. Every police agency, particularly those in urban areas, can expect that its officers will encounter emotionally disturbed persons, or persons with diminished capacity. This is a term used by law enforcement to identify persons who are exhibiting unusual, strange, bizarre or erratic behaviors. Some of these types of individuals have ingested drugs or large quantities of alcohol, have mental illness, or are suicidal. The number of these types of persons has increased during the past 40 some years with their presence in urban areas now being considered commonplace. This trend has increased with the elimination of governmental facilities for these types of persons since the administration of President Kennedy. These persons of diminished capacity present law enforcement officers with special needs. Field officers are presented with multiple choice options. Making the wrong choice frequently results in unreasonable uses of force and exacerbates the situation resulting in unnecessary harm to the person with this diminished capacity. Providing field officers with specific training and guidelines assists them in making the correct choices. Numerous court cases since the early 2000s have cited the need for reasonable officers to consider a person's diminished capacity when determining the need for and type of force to be used in controlling this type of special needs person.

12. I use in training on the subject of dealing with persons who may be emotionally disturbed and/or suicidal an acronym – CCCT. This is a graphic model that embodies the leading law enforcement materials on this subject. Some of these sources are both books by Gerald Murphy published in 1986 Special Care: Improving the Police Response to the Mentally Disabled and in 1989 Managing Persons with Mental Disabilities, the International Association of Chiefs of Police Training Keys 273 Suicide Intervention and 274 Mentally Ill, and the initial authoritative police manuals by Rowland and Matthews published between 1954 and 1975 Police Manual: How to Recognize and Handle Abnormal People. These concepts have been more recently codified in the 1997 Model Policy and Concept Paper 'Dealing with the Mentally Ill," by the International Association of Chiefs of Police. These tactical police concepts are also outlined in the authoritative texts by Calibre Press including Street Survival: Tactics for Armed Encounters, 1981, and The Tactical Edge, 1986.

Coordination. The concept of devising a plan. Allocating available resources and ensuring that sufficient units and equipment are brought to the scene. Determining who will be doing what aspects of the operation. Developing a perimeter to ensure that outside persons don't become involved. Determining who will be the lead person. Ensuring that the officers at the scene conduct themselves in [sic] manner not to unnecessarily agitate or excite the subject.

Containment. Devising a plan which will contain the subject. This includes the ability to convince the subject that they do not need to move or continue flight. This oftentimes requires officers to ensure that they respect the comfort zone of the subject and not agitate or compress this comfort zone.

Communication. One person should be designated as the command voice. Verbal communication should be non-threatening. Open ended questions should be used which will facilitate the subject's participation. Various methods of communication should be used particularly if the subject does not respond. Sharp, authoritative commands should be avoided. Officers must constantly analyze what affect [sic], if any, their efforts are having on the subject.

Time. History has shown that the longer the encounter is allowed to occur, the better the chance of a successful and safe resolution. This allows the subject to reflect on his or her predicament. It also allows for the deployment of additional police resources. It encourages the ability to communicate and create a relationship between the lead officer and the subject.

13. These generally accepted police practices for dealing with persons of diminished capacity, emotionally disturbed are also documented in the training and written orders of the San Francisco Police Department. These have been identified in paragraph 6 of this report.

14. Some specific excerpts from these documents include:

- Chapter 5 "Mental Illness" of LD 37: "Recognizing behaviors associated with mental illness fearfulness; inappropriate behavior; extreme rigidity or inflexibility; excitability; impaired self-care; hallucinations; delusions; disorganized speech, thought patterns or disorientation; and depression " (4-4/6) 4-9 identifies numerous indicators for field officers including, ' . statements regarding commission of a violent or dangerous act from subtle innuendos to direct threats begging to be left alone " 4-11 identifies "appropriate tactical actions" for field officers including, "Request backup; calm the situation, communicate, do not make threats, be truthful " These are further delineated with suggestions including, "Move slowly assume a quiet nonthreatening manner when approaching and conversing with the individual explain intended actions before taking action take time to assess the situation give the person time to calm down keep sentences shot [sic] . avoid topics that may agitate the person do not threaten the individual with arrest or in any other manner threats may create additional fright, stress or potential aggression "

- "Communication Techniques and Non-Violent Crisis intervention" presents similar directions for field officers. Some of these in this training session also included planning, giving options, communications techniques and movement issues.

- Similar directions are included in the SFPD Roll Call Training Lesson "Psychological Evaluation of Adults Part 1-3."

15. Officer Holder and Sgt. Reynolds in this case involving Ms. Sheehan had specific information relayed to them by the dispatch and when they initially talked to Heath Hodge upon arrival. They were informed specific indicators regarding Ms. Sheehan's mental disability and Mr. Hodge's belief that she needed to be committed for evaluation under Section 5150. Officer Holder testified in her deposition that Mr. Hodge told her Sheehan "was in a downward psychotic spiral." Officer Holder indicated that meant to her "That sounded pretty severe." The officers were informed by Mr. Hodge that he had been verbally threatened by Ms. Sheehan and that she refused to allow him entry to her apartment. Both officers believed that they were informed by Mr. Hodge that other persons were not in the building. Both officers acknowledged that there was no information or belief that Ms. Sheehan was suicidal and, other than the verbal threat, there was no information that she was violent or had any history of being violent. Officer Holder testified in her deposition that Ms. Sheehan was not acting in a rational manner.

16. The actions of both officers were contrary to the above directions for field officers dealing with a person of diminished capacity and a known diagnosis of mental illness. First, there was no coordination by taking the time to gather more specific information from Mr. Hodge; they did not

take time to assess the situation including evaluating the building for ingress and egress options; and didn't conduct themselves in a manner to not further agitate Ms. Sheehan. Secondly, they did nothing to contain Ms Sheehan. And lastly, they did not exercise any of the commonly used and accepted practices of proper communication techniques and using time as an advantage.

17. The actions of Officer Holder and Sgt. Reynolds were all contrary to reasonable and generally accepted practices for dealing with someone known to be of diminished capacity and suffering from a mental illness. They simply rushed into the situation using unreasonable police field procedures, compressed the situation, invaded Ms. Sheehan's zone of comfort, created tactics known to exacerbate this type of situation and agitate someone in this fragile state, and quickly resorted to the use of force, including deadly force.

18. Officer Holder and Sgt. Reynolds forcibly entered Ms. Sheehan's private residence contrary to reasonable and generally accepted police practices. Any reasonable officer with the tenure and training of these officers would have known that this forcible entry into a private residence was unreasonable and contrary to generally accepted police practices.

19. Law enforcement officers from their first days in the basic police academies are taught the provisions of the Fourth Amendment, specifically the absolutes regarding entering a private dwelling. This provision is documented in numerous police

references, including those of the San Francisco Police Department.

20. The San Francisco Police Department training comports with the Learning Domains of the California Commission on Peace Officer Standards and Training (POST) Chapter 3 covers warrantless searches and seizures. "Although warrantless searches and seizures are presumptively illegal, when certain conditions are met, officers may lawfully search and seize evidence without a search warrant. For evidence to be admissible at trial, officer must have a clear understanding of the legal requirements for those conditions."[1] Under the section on Exigent Circumstances it lists "Under exigent circumstances, the primary purpose of the officer's entry if [sic] to attend to the emergency situation.

21. Chief of Police Fong issued a Department Bulletin on November 1, 2006, regarding provisions for entering a private residence.[2] "California courts and the United States Supreme Court have consistently held that officer *may not* enter a home to make a warrantless arrest of an occupant simply because they have probable cause to arrest. Officers must also have a legal right to enter an area when there is a reasonable expectation of privacy; e.g. an arrest warrant, consent or exigent circumstances *Ramey* is focused on the physical intrusion into the home, where there is

---

[1] LD 16: Chapter 3 – Warrantless Searches and Seizures," POST

[2] Ramey-Entering a Home to Make an Arrest"

the greatest expectation of privacy, and one of the highest levels of judicial scrutiny,"

22. "**Search of the premises** Except under conditions when you pursue someone into a house or apartment or other private place, or when contraband or other evidence is in plain sight while you are lawfully inside the place, or when you can show that you did not have time to get a warrant prior to the search because the delay would result in destruction of the evidence, your best option is to seek permission for the search from a person who has a legal right to give consent to search the place or person you wish to search."[3]

23. "What if the police manufacture an exigency? If they do so by unlawful conduct the fruits doctrine would seem to control. If the subjective intent of the officers is relevant to this Fourth Amendment analysis, then the same result would be mandated even if the conduct was legal. Because exigency is a warrant exception based on the inability to obtain a warrant, it would seem that intentionally creating a situation in which it is impossible to obtain one should not be allowed."[4]

24. Officer Holder and Sgt. Reynolds made two (2) entries into the private apartment residence of Ms. Sheehan during this occurrence. The first when they used the key provided to them by the

---

[3] *Police Field Operations, Second Edition*, Thomas Adams, Prentice Hall, 1990, 348-349

[4] *Warrantless Search Law Deskbook*, 2003 Edition, Paul Joseph, Thomson/West, 342-343

Social Worker, Hodge, the second when they forcibly kicked and shouldered open the door to her private residence.

25. Mr. Hodge testified at the Preliminary Hearing of Ms. Sheehan that when he entered her apartment using the key provided by the unit manager Ms. Sheehan said: "You don't have a warrant. I have a knife and I will kill you." Mr. Hodge acknowledged that he did not see any knife. He further testified that when the officers arrived he gave them the key to Sheehan's private residence. Mr. Hodge testified at the Preliminary Hearing that he didn't give the officers any sense of urgency, "I didn't convey any sense of urgency, no." After Ms. Sheehan refused to respond to their knock on the door the officers entered using the key, Mr. Hodge testified that Ms. Sheehan again told them to get out of her room and she said, "I will call the police."

26. Sgt. Reynolds testified in the Preliminary Hearing that her reason for going into the private residence of Ms. Sheehan was to assess her psychological situation. "Even though the social worker was able to issue his 5150, I still felt it was my responsibility to make sure she meet [sic] that criteria. My intent was to go upstairs and evaluate her as well at that point." When she entered the first time Ms. Sheehan grabbed a knife and yelled: "I am going to kill you. I don't need help. Get out." Ms. Sheehan closed the door to her apartment. During her deposition, Sgt. Reynolds testified Ms. Sheehan said, "Get out of my room. I don't need your help."

27. Officer Holder testified in the Preliminary Hearing that Ms. Sheehan said: " you don't have a search warrant, I've already made a police report so you can't come in my room."

28. It was obvious that before entering Ms. Sheehan's private apartment it [sic] should have been aware that she was not consenting to an entry. The officers were dealing with a civil matter and were simply there to assist the Social Worker with a transportation matter. Other than her verbal threat to Mr. Hodge, at best a misdemeanor crime, there was no information that she was endangering anyone else or suicidal. Sgt. Reynolds testified in her deposition that it was her belief there was no threat to others in the building.

29. SFPD Roll Call Training Lesson "Exigent Circumstances – Forcible Entry," discusses the specifics of *People v. Weiss* 87 Cal App 4th 1265 (2001) in giving direction to field officers on welfare checks. Officer in *Weiss* acted with restraint – they did not just break into the apartment after learning that the residents had not been seen of (sic) 24 hours. They tried various ways of confirming or dispelling their suspicions that someone inside might be injured. It was only when they ran out of options, that they made a forcible entry. This conduct was undoubtedly one of the reasons the court ruled the entry and search were lawful. Patience and composure are qualities the courts like to see in law enforcement officers.

30. It is obvious from the testimony of the officers in the criminal matter regarding Ms. Sheehan that

there were no exigent circumstances present when the officers elected to use the key to enter her private residence. There were many other reasonable alternatives that the officers elected to discard or not employ.

31. The second entry into Ms. Sheehan's private residence was certainly more forceful. The door was kicked and broken and then shouldered open by Officer Holder. The reason the officers have both given in their testimony is that a felony had now been committed during their earlier unreasonable entry. The officers, specifically Sgt. Reynolds, testified to various points that they contend now made their second entry reasonable under the exigency concept. However, as explained in my report earlier, all of these were created by their own choices to not handle this encounter with a person of diminished capacity in a manner consistent with generally accepted police practices. While in my opinion no exigency existed, if it did it was of the officers' own making.

32. Sgt. Reynolds testified in her deposition that her intention was to "subdue" Ms. Sheehan. Sgt. Reynolds acknowledged when Ms. Sheehan closed the door on them she took a different approach and no longer considered her capacity as a diminished, mentally ill person. When she ordered Officer Holder to force open the door she testified in her deposition, "I was not thinking of her psychological state."

33. The second encounter should have been considered a barricaded subject incident. There also

was sufficient time to now secure a warrant, rather than continue to exacerbate the encounter. The officers knew Ms. Sheehan was contained, had secured a knife, verbally refused entry to her private residence and was mentally ill and acting in an irrational manner.

34. SFPD General Order 8.02 "Hostage and Barricaded Suspect Incidents" is typical of those used by police agencies throughout the country. It defines a barricaded suspect incident as a situation where a criminal, intent upon evading arrest, takes up a defensive position armed with a gun, explosive, or a weapon capable of harming others and presents a deadly hazard to arresting officers." It further indicates "it is the policy of the San Francisco Police Department to use hostage negotiators to attempt a negotiated surrender." It directs the officers on the scene to follow specific procedures including "Notification, Evaluation, Perimeter, and Command Post."

35. Had Officer Holder and Sgt. Reynolds followed their agency's directive that is consistent with general accepted police practices they would have been forced to conduct themselves consistent with the proven tactics for dealing with this type of situation rather than continue to exacerbate the encounter with Ms. Sheehan, a person of diminished capacity.

36. **The use of deadly force by both Officer Holder and Sgt Reynolds was contrary to generally accepted police practices for the specific circumstances of the encounter with Ms. Sheehan, a mentally ill person of**

diminished capacity. In my opinion, their tactics were what created the necessity for the officers to resort to the use of deadly force. Had the officers responded in a reasonable manner, consistent with generally accepted police practices the necessity to resort to the use of deadly force would likely not have occurred.

37. Police field encounters are seldom "split second decision making" events. Normally responding police units to a call for service has specific information provided by the agency's communications center. This information is a distillation of the call from the citizen. Responding officers are trained to tactically approach calls, particularly ones that have a high risk potential such as one dealing with an emotionally disturbed person. Reasonable officers are trained to assess the situation, evaluate various tactical approaches and coordinate their efforts with other officers.

38. Most field police encounters are not single events. They are a series of events, such as the one involving Theresa [sic] Sheehan, and officers are trained to continuously evaluate the newly developing events and make decisions in response. Nearly all police field encounters are multiple events requiring multiple decision points for the officers. Police training and critical incident evaluations are done using fractions of seconds. When field police units make conscious choices and fail to use reasonable and generally accepted police practices and tactics, they may unreasonably compress the encounter and intensify the

decision making process. These frequently will then result in deadly force encounters.

39. This was the case with Officer Holder and Sgt Reynolds and their encounter with Ms. Sheehan. The first decision point was when Officer Holder was on the scene and met with Social Worker Hodge. The second decision point was when Sgt. Reynolds arrived on the scene and also met with Mr. Hodge and conversed with Officer Holder. The third decision point was when the officers used the key provided by Hodge to enter the lower locked door to the residence. The fourth decision point was when the officers used the key to enter the private residence of Ms. Sheehan. The fifth decision point was when the officers became aware of Ms. Sheehan, her threats to them, her denial of entry to her apartment and the obvious tactical disadvantages of the landing the officers were on. The sixth decision point was when the officers elected to not relocate to a safer tactical position, call for special units/equipment, and determine the propriety of seeking a warrant. The seventh decision point was when the officers elected to forcibly enter the private residence of Ms. Sheehan. The eighth decision point was when the officers elected to use force, including deadly force. The last decision point was when Sgt Reynolds fired her final round into Ms. Sheehan's head.

40. From the CAD printout, the officers were on the scene 26:12 minutes between the time of Officer Holder's arrival and the request for backup units. This would have been the time approximately coinciding with the second, forcible entry into Ms. Sheehan's private residence. Within 1:31 minutes

later the CAD printout shows another unit reporting "shots fired."

41 The testimony of Officer Balinton and Sgt. Campbell indicates that they were on the scene, either on the front steps or approaching the front steps, when both heard the shots fired inside. Both of these officers were with another officer. Sgt. Campbell had a less lethal weapon in his trunk and was about to pull it out when he heard the shots fired.

42. Reasonable police officers are trained in the legal and operational aspects of use of force. Use of force training all must conform to the Supreme Court decisions and state law. This training has become national in scope. Model policies on use of force are promulgated by several national guidance bodies such as the International Association of Chiefs of Police. Police officers are provided with laws, models and subject control tactics to use. These are designed to be within the parameters of legal uses of force. They are also designed to protect not only the officers involved, but the subject upon whom force is used. Officers are restricted in the use of force to use only that force which is reasonable and necessary to overcome resistance, comply [sic] cooperation and affect [sic] an arrest (*Graham v. Conner*). The police training stemming from this case and generally accepted by police practitioners is that the force used by officers must be evaluated on the seriousness of the crime, the level of resistance of the subject. the continuing threat to officers and others, and whether the subject is capable of resisting arrest and fleeing.

43. This use of force training is usually complemented by the use of some form of use of force/control/subject resistance matrix, continuum or graphic. These are very similar in the basic content. They identify levels of subject resistance and types of officer reaction/response to this resistance. The graphics are designed to demonstrate visually to police officers, trainees and others viewing the document the reasonable relationship between what a subject being arrested/restrained does and the officer's response. Common to these graphics are subject levels of resistance such as verbal, passive, active, assaultive, aggressive and aggravated. Common descriptors used for officer response are presence, verbal, soft hand control, chemical agents, hard hand control, transporters, intermediate, incapacitating and deadly force.

44. These concepts are similar to those embodied in the San Francisco Police Departments training and written policies. The training is from POST in "LD 20: Use of Force." The policies controlling use of force in the Department are General Orders 5.01 "Use of Force" and 5.02 "Use of Firearms."

45. There was no logical reason that the officers did not pull back from the landing outside Ms Sheehan's private residence after their first attempt to enter. The location was a tactical disadvantage for the officers. Both officers knew that Ms. Sheehan had refused their entry and made specific comments regarding the necessity for a warrant. They knew that other resources were en route to their call for backup. Officer Holder's [sic] and Sgt. Reynold's continued conduct exacerbated

the confrontation, rather than any effort to diffuse the agitation. Their presence in the manner they chose to deploy it simply invaded the zone of safety for Ms. Sheehan This is known to further agitate the subject in these types of police encounters. No one coordinated the efforts to enable the dispatch of negotiators which would have been consistent with San Francisco Police Department General Order 8.02 "Hostage and Barricaded Suspect Incidents."

46. Officer Holder in her police statement and her testimony at the Preliminary Hearing stated that the final shot fired by Sgt. Reynolds was when Ms. Sheehan was already on the ground and that this shot struck Ms Sheehan in the head. Sgt. Reynolds testified in the Preliminary Hearing, "I know my last round struck her in the face, and at that point is when Miss Sheehan fell to the ground."

47. Reasonable police officers are trained to evaluate each and every shot as a distinct deadly force decision. When Sgt. Reynolds fired her last round into Ms. Sheehan (who was on the ground from Officer Holder's observation), this deadly force decision and use would have been contrary to generally accepted police practices. At this time there were two officers in position to have controlled her and four (4) other officers on the scene.

48. It is my understanding that additional materials may be in process of being produced or may be requested later. I would request that this report be considered a preliminary report. Should any subsequent information be produced and materially affect or alter any of these opinions, I will

either submit a supplemental response or be prepared to discuss them during any scheduled deposition.

49. At this point in the development of this case I do not know whether I will be using any demonstrative aids during my testimony. Should I decide to use any such tool, I will assure that they are made available for review, if requested, prior to their use.

50. My fees for this professional service is a flat Case Development Fee of $7500 and a fee of $2500 for a deposition in the Atlanta area or $2500 per day plus expenses for services away from the Atlanta area including depositions and trial appearances.

This report is signed under penalty of perjury on this 13th day of Dec. 2010, in Jasper, GA

/s/ Lou Reiter
Lou Reiter

LOU REITER . . . RESUME

LOU REITER & ASSOCIATES
887 Chula Drive, Jasper, GA 30143
706.268.1824 401.226.1383(cell)
loureiter@gmail.com LREITER583@AOL.COM

POLICE CONSULTING EXPERIENCE

Lou Reiter has been the principal consultant with Lou Reiter & Associates since its inception in 1983.

In that capacity he has been providing professional consulting to law enforcement agencies in three primary areas: (1) training, (2) agency audits and (3) litigation services.

TRAINING

Lou Reiter typically conducts 15-20 training seminars and programs each year involving approximately 1000 persons. These presentations range in time from 3 hours to five (5) days with the majority being a two (2) day seminar. Normally attended by police supervisors, managers, command personnel and litigation/risk management elements, these seminars involve police practitioners from federal, state, county and municipal law enforcement agencies.

The most common areas of presentation and instruction are:

- Managing the Internal Affairs function, police discipline and the citizen complaint process.
- Investigation of critical incidents – officer involved shootings, use of force, and pursuits/emergency responses.
- Police discipline.
- Use of force and deadly force issues.
- Police pursuit/emergency response issues.
- Investigative procedures and supervision.
- Personnel practices.
- Supervisory techniques.
- Liability management.
- Policy and procedure development.

- Jail intake procedures.
- Management effectiveness.

These training programs have been presented in the following states for police training academies, private training groups, public agencies, governmental entities and academic facilities:

California	Ohio	Washington	New Jersey
Florida	Indiana	Hawaii	Connecticut
Georgia	Wisconsin	Vermont	District of Columbia
New York	United Kingdom	North Carolina	New Mexico
Texas	Minnesota	Illinois	Michigan
South Carolina	Missouri	Oklahoma	North Dakota
Massachusetts	Arizona	Louisiana	Arkansas
Rhode Island	Nevada	Mississippi	Alabama
Pennsylvania	Utah	Kentucky	U.S. Virgin Islands
Virginia	Colorado	Tennessee	
Maryland	Oregon	Alaska	

LAW ENFORCEMENT AGENCY AUDITS

These types of agency audits take on many different forms. Some are designed to identify the strengths and weaknesses of the agency, make recommendations and present specific timetables for implementation. Others are specifically designed to evaluate the agency's liability potential, make recommendations and suggest implementation strategies. Some involve budgetary concerns and consideration of consolidation of police jurisdictions. Occasionally the purpose is to conduct an administrative investigation using external investigators due to sensitive or political potential

conflicts of interest. Some are accreditation and re-accreditation on-site assessments for the Commission on Accreditation for Law Enforcement Agencies, Inc.

These audits are conducted either as a one-person unit or as a member of a larger team of police professionals, although not more than six (6) total. Most of these are through contracts with the affected governmental body. Some are through a litigation or risk management unit.

In 2001, Lou Reiter was appointed as the Federal Court Monitor for the consent decree in *Colin, et al., v. County of Ventura, et al.*, CV 97-8352, 98-3051 and 98-6092 LGB (Cwx), United States District Court, Central District of California.

Since 1996, Lou Reiter has acted as a consultant for the Special Litigation Section, Civil Rights Division, U.S. Department of Justice, in six (6) pattern and practices investigations concerning the cities of New York, New Orleans, Pittsburgh, Buffalo, Columbus, OH., and Charleston, WV. He has also worked with the cities of Cincinnati and Schenectady which were being investigated by this governmental agency.

Lou Reiter since 1983 has audited law enforcement agencies as small as three (3) persons to as large as 39,000 personnel. They have represented municipal, county and state entities. Normally, he conducts 3-5 of these audits each year. During these forms of audits, he rides with line officers and first level supervisors for nearly 100 or more hours for interviews and direct observation of field implementation.

The primary areas of focus during these audits are:

- Citizen complaint procedures.
- Discipline, internal affairs and early warning systems.
- Personnel practices including selection, hiring, EEOC/AA, promotion, assignment and retention.
- Specialized operations including traffic, investigations, narcotics, vice, intelligence, emergency response teams and unusual occurrence units.
- Organizational structure and command responsibilities.
- Police department governance.
- Policy and procedures development.
- Use of force policy and procedures.
- Investigation of critical incidents.
- Training and training documentation
- Use of police resources
- Support functions including communications, records and detention and holding facilities.

These types of agency audits have been conducted in the following states:

Florida	Pennsylvania	Illinois	New York
Georgia	North Carolina	Wisconsin	Rhode Island
Arizona	South Carolina	West Virginia	Washington
Colorado	Virginia	Louisiana	New Jersey
Ohio	New Mexico	Tennessee	Kentucky
Delaware	California	Texas	Connecticut

LITIGATION SERVICES

Lou Reiter, since 1983, has been involved in over 1000 law enforcement civil litigation cases and a few criminal matters. He has acted both as a consultant and testimonial expert witness. These have been in Federal and local courts. He has worked with plaintiff attorneys approximately 60 percent of the time and the remainder with defense units. He has also been employed in this area by insurance entities, risk management pools, local prosecutorial offices and the United States Department of Justice.

While there has been a wide range of specific law enforcement practices and procedures which have been involved in these cases, some of the more common issues addressed in case development and subsequent testimony have been:

- Field procedures including tactics, arrest techniques and pursuits/emergency response driving.
- Standards of police misconduct investigations.
- Use of force and deadly force.
- Supervision.
- Investigative procedures, including warrant applications, informant control and use, and search warrant processes.
- Jail intake procedures.
- Police management.
- Personnel practices, including hiring, retention, remediation, background investigations,

use of professional counseling services and promotion/assignment.

- Investigation of citizen complaints.
- Employee discipline.
- Police policy and procedures development.
- Police training.

These litigation services have been in the following states and jurisdictions:

Florida	California	Michigan	Alaska
Georgia	Texas	Iowa	Hawaii
Alabama	Missouri	Oregon	Montana
Mississippi	Illinois	New Mexico	Wyoming
Louisiana	Indiana	Arizona	Colorado
Kansas		Maryland	Maine
Oklahoma		Pennsylvania	New Hampshire
Texas		New York	Puerto Rico
Kentucky		New Jersey	Rhode Island
Tennessee		Delaware	Washington
Minnesota		Connecticut	Wisconsin
Ohio			Massachusetts
South Carolina			Idaho
North Carolina			West Virginia
Virginia			Nevada

PRIOR ACTIVE POLICE EXPERIENCE

Lou Reiter was a sworn member of the Los Angeles Police Department for 20 years between 1961-1981. He began as a police officer and retired as a Deputy Chief of Police. During that tenure he served in over 20 assignments. Some of those assignments included:

Promotion schedule.

- 1980 Deputy Chief of Police
- 1976 Commander
- 1974 Captain
- 1970 Lieutenant
- 1966 Sergeant
- 1961 Police Officer

Personnel and Training Bureau, Commanding Officer. As a Deputy Chief directed the operations of three (3) divisions and two (2) major sections, involving over 300 employees.

- Responsible for all training, personnel management, recruitment and selection, employee-management relations and behavioral science services
- Responsible for the successful implementation of the 1980 Consent Decree requiring increased hiring of females and minorities
- Chairman of the Use of Force Review Board which adjudicated all officer-involved firearm discharges, serious injuries resulting from police action and in-custody deaths
- Caused the initiation of a unique peer counseling program for employees and a transfer system for "burned out" employees from high activity areas and assignments.

Operations West Bureau Commanding Officer. Directed all police operations (patrol, traffic, investigations and vice/street narcotics) in the Western quadrant of the City with four (4) geographic stations

and one (1) traffic division involving over 1400 employees.

Planning and Fiscal Bureau Commanding Officer. Directed the operations of five (5) divisions, involving over 400 employees.

- Responsible for the $310 million Police budget preparation and management
- Automated systems
- Planning and research
- Communications
- Guided the development of the Emergency Command Control Communications System, a multifaceted computer based system financed by a $40 million tax override
- Provided on-going liaison with the City Council and directed efforts to develop local and state legislation

Uniformed Coordinator for Operations Central and Valley Bureaus. Each Bureau consisted of five (5) geographic stations, a traffic division, gang enforcement unit, and over 1600 employees. In addition to the overall coordination of patrol and uniformed operations, monitored and approved personnel complaint investigations, adjudications and discipline during this four (4) year assignment.

- Coordinated the successful police efforts in the San Fernando Valley during the 1978 school desegregation
- Directed the City-wide 500 person police reserve officer program

- Department liaison to community alcoholism programs
- Participant in the Physical Altercation and Tactics Committee
- Regular member of the Fleet Safety Review Board and Shooting Review Panel.

Central Area Commanding Officer. For two (2) years commanded over 250 uniformed officers and detectives in the Los Angeles Central City (downtown) area.

Team policing. Selected to make preliminary preparations and then command a unique team policing experiment in Foothill Division in July, 1973 (this was similar to the current Community Oriented Policing concept). This consisted of a command of 57 employees including detectives and traffic officers to maintain 24-hour police service for this area. Crime went down in this area while it rose in adjacent areas.

Traffic assignments. Served as a uniformed traffic accident investigator throughout the City. Investigated 1200-1500 traffic accidents and arrested nearly 400 drunk drivers. Provided specialized enforcement and accident investigation on the City's freeway systems in specially equipped pursuit vehicles.

Patrol assignments. Was a uniformed patrol officer in three (3) geographic stations. Functioned as a plainclothes member of an anti-crime unit. As a sergeant was a field supervisor and later, as a lieutenant, was a uniformed watch commander.

Employee misconduct administration. Investigated cases alleging employee misconduct both as a field supervisor and member of Internal Affairs Division. As the Department Advocate, presented the agency case against employees during internal administrative hearings (Boards of Rights). Later, as a Lieutenant, acted as a defense representative for accused employees during these same hearings. Adjudicated investigations of police misconduct and served as a member of Boards of Rights on many occasions.

Other personnel related activities. Participant in the Physical Altercation and Tactics Committee, Fleet Safety Review Board and Shooting Review Board. In 1981, chaired the Police Productivity Workshop which presented recommendations for massive changes in operations to respond to budgetary restrictions imposed by the passage of Proposition 13.

Training commands and assignments. Commanded (1980-1981) the Personnel and Training Bureau which included the Police Academy and video training production unit. Implemented programs (1980-81) to assist in the achievement of court consent decree hiring of females/minorities and their successful performance during the training aspect of their employment. Was the Assistant Commanding Officer of the Police Academy. Was the Officer-in-charge of the Human Relations Training Unit which covered such topics as community and cultural diversity, officer-partner relations, inter-personal communications,

and handling the emotionally disturbed and mentally ill.

Staff researcher and author for the 1973 *Police Task Force Report* of the National Advisory Commission on Criminal Justice Standards and Goals. The report assisted agencies nationwide to update their operations and develop plans for future growth and strategies. The three (3) specific chapters researched authored by Lou Reiter were "Internal Discipline, Training and Management-Employee Relations."

Managing Unusual Occurrences. Member of the Department Field Command Post Cadre since its inception following the 1965 Watts Riots. Developed procedures for police operations during such incidents principally as a member of the Operations Section and later incident command functions. Participated in numerous actual unusual occurrence control operations as well as training exercises responding to natural and man-made incidents.

Volunteer police. Managed the LAPD 500 person Reserve Officer Corps. Developed revised training programs and an in-service training element. Created a unique expert advisory group within this volunteer corps specializing on the expertise of lawyers, doctors, statisticians, educators and other specialists. Implemented a 54 person Reserve Chaplain program. Lobbied for and supported State laws mandating strengthened training and selection requirements for volunteer elements of police agencies.

Community Relations and Crime Prevention. Community Relations lieutenant and Assistant Commanding Officer of Hollywood Division, directing the community mobilization and crime prevention efforts. Was the Officer in Charge of the Public Service and Crime Prevention Section, Public Affairs Division.

New Careers and Concentrated Employment Program. In 1967, initiated, implemented and administered this U.S. Department of Labor funded program which employed, trained and assigned disadvantaged, underemployed persons to police community relations and crime prevention programs. Ninety (90) percent were ex-convicts or former narcotics users.

Planning and Research. Researched and authored policy and procedure changes for the Department and incorporated them into the Department Manual.

ADDITIONAL INSTRUCTIONAL EXPERIENCE

During the years since 1971, Lou Reiter has been involved in continuous and varied aspects of training both within and outside the law enforcement field. Some of those not covered in the preceding sections are:

- Faculty member for national level police management and specialized programs for organizations such as the Public Agency Training Council (Indianapolis), Americans for Effective Law Enforcement (Chicago), Institute for Police Technology and Management (Jacksonville, FL.), Police Foundation

Executive Institute, Commission on Accreditation for Law Enforcement Agencies, National League of Cities, Law Enforcement Assistance Administration, academic institutions, local police academies, state police organizations and risk management/insurance pool groups.

- Senior Consultant, Institute for Liability Management.
- Faculty member, Criminal Justice Management Program, Florida Center for Public Management, Florida State University.
- Certified Instructor, Law Enforcement Supervision/Management, Florida Department of Law Enforcement.
- Lifetime Vocational Training Certificate, Law Enforcement, California.
- Developed and presented "Frontline Supervision," a police supervision program.

Elected to the Santa Clarita Community College Board of Trustees in 1975 and reelected in 1979. Served as Board President and acted on many local and State committees on education.

Past member:

- Police Science Advisory Boards for Junior Colleges of Rio Hondo, El Segundo and Harbor City in the Los Angeles area.
- Faculty member for graduate and undergraduate level courses at various universities and colleges.

- Principal faculty member for the Management Development Program for the City of Los Angeles.
- Trainer for Florida American Cancer Society's Volunteer Leadership Development Program.
- California State University, Northridge, Advisory Committee on Teacher Education.
- Advisory Committee on Clinical Rehabilitative Services Credential, Department of Communicative Disorders.

LAW ENFORCEMENT PROFESSIONAL ACTIVITIES

Since 1973, Lou Reiter has been involved in law enforcement professional activities and programs. Many of these were during his tenure with the LAPD. Others have been as a concerned public member and police consultant. Some of those include:

- Assessor, Commission on Accreditation for Law Enforcement Agencies, Inc., (1985-), and has been assigned to both on-site audits for accreditation and re-accreditation. Re-certified as an assessor in 1999 at Montreal Conference and in 2002 at Cleveland.
- American Society for Law Enforcement Trainers, member.
- National Internal Affairs Investigator's Association, member and conference presenter. National Center for Women and Policing, member.

- Public Safety Committee, Big Canoe, GA.
- Founding Member, Tallahassee Committee of Ninety-Nine and former member of Board of Directors (1982-1988) and Secretary (1984-1987). This organization was formed in 1981 and provided support to local law enforcement agencies for greater professionalization, underwriting local police training programs, purchasing police equipment and ensuring benefits to families of police officers.
- Presenter and participant, 1982 and 1983 Florida Governor's Challenge Conference on Crime. Chair, Public Safety Committee, 21st Century Council, City of Tallahassee (1990-1993). This citizen group was organized to create an annual assessment guide to evaluate the effectiveness of our community's public safety performance.
- Past member, California Peace Officers Association
- Chairman (1979-81) Standards and Ethics Committee.
    - Initiated and moderated the First Joint Symposium on Professional Issues.
    - Developed and received State approval and distribution of the *Code of Professional Conduct and Responsibilities for Peace Officers*.
    - Member, Law and Legislation Committee.
    - Member, Small Agency Committee.
    - Member, Reserve Officers Committee.

- Recipient of the 1981 'Professionalism Award' from the California Peace Officers Association.

- Member or past member:
  - Florida Sheriffs' Association, Lifetime Member.
  - Florida Council on Crime and Delinquency.
  - American Society for Training and Development, local and National.
  - Public Safety Committee, League of California Cities.
  - Los Angeles County Peace Officers Association.
  - Southern California Police Community Relations Officers Association.

PUBLICATIONS

Lou Reiter has published many law enforcement articles. With the exception of his Internal Affairs manual mentioned below, most of his current publications are integral parts of training he provides and are tailored to the specific subject matter and audience of the presentation. The below represent many of his published works:

- *Law Enforcement Administrative Investigations, a manual/guide.* This comprehensive 120 page manual was first published by Lou Reiter & Associates in 1993. The 2nd edition was published in 1998 and is an expanded version with several guest author chapters

and contains over 300 pages in a 'nuts and bolts' method of presentation for practitioners. The Third Edition was published in November, 2006, by the Public Agency Training Council.

- "Narcotic/Special Enforcement Unit Control and Audit," Lou Reiter, Stephen Campbell and Steve Rothlein, LLRMI/PATC newsletter, August, 2010
- From the United States Supreme Court Search of Officer's Text Messages from Department Issued Pager was Reasonable, Lou Reiter/Jack Ryan *City of Ontario v. Quon*, 560 U.S. ___ Slip op. 08-1332 (2010), LLRMI/PATC newsletter, July, 2010
- "Nepotism and Fraternization in Public Safety Agencies," LLRMI/PATC newsletter, July, 2010
- "*Brady*: The Next Step for Law Enforcement Agencies," LLRMI/PATC newsletter, January, 2010
- "*Garrity* and the Civilian Review Board," LLRMI/PATC newsletter, August, 2009
- "Must you tape and transcribe interviews in administrative investigations?" LLRMI/PATC newsletter, August, 2009
- "The Economy and Unexpected Employee Problems," LLRMI/PATC newsletter, June, 2009
- "Are Your Internal Affairs Reports Confidential?" LLRMI/PATC newsletter, December, 2007

- "Domestic Misconduct Involving Public Safety Employees," LLRMI/PATC newsletter, 3 Parts, June, 2007
- "Sexual Misconduct by Public Safety Officers is a Job for Use [sic], Not the Courts," LLRMI/PATC newsletter, August, 2007
- "Conduct Unbecoming: Sex, videotapes, the internet and police misconduct," Public Agency Training Council Information, April, 2007
- "Procedural Time Limits in Administrative Investigations – Absolutes," The Local Government Liability Beat, Georgia Risk Management, March, 2007
- "Sex, Videotapes, the Internet, and Police Misconduct," Law Enforcement Executive Forum, Illinois Law Enforcement Training and Standards Board of Executive Institute, Western Illinois University, 2007
- "Are You Providing Reasonable Training and Policy Direction on the Handling of the Mentally Ill and Emotionally Disturbed Persons," LLRMI/PATC newsletter, September, 2006
- "Preparing a Defense in Law Enforcement Litigation: A Formula for Law Enforcement," LLRMI/PATC newsletter, August, 2006
- "Conduct Unbecoming: Still a Viable Discipline Charge," LLRMI/PATC newsletter, June, 2006
- "Common Questions About Law Enforcement Administrative Investigations," LLRMI/PATC newsletter, March, 2007

- "Administrative Insight: A Key to Defending Your Decisions for Administrative Investigations," Law Enforcement Risk Management Legal Update, Summer, 2006, LLRMI/PATC
- "Preparing a Defense in Law Enforcement Litigation: A Formula for Law Enforcement," Public Agency Training Council Information, August, 2006
- "The Search for Witnesses in Law Enforcement Administrative Investigations," LLRMI/PATC newsletter, September, 2005
- "Rhode Islands [sic] Law Enforcement Officers Bill of Rights Needs a Fresh Look," Providence Journal OpEd article, July, 2005
- "The Need for an IA/OPS Audit," LLRMI/PATC newsletter, March, 2005
- "Creating Reasonable and Defensible Discipline," Commission on Accreditation for Law Enforcement Agencies, Inc., *Newsletter*, November, 1996.
- "Timesharing With Your Subordinates," *Florida Police Chief*, April, 1984.
- "Police Agencies Need Shooting Policy," *Tallahassee Democrat*, September 27, 1982.
- "Truth About Miami Is Down in the Streets," *Tallahassee Democrat*, December 27, 1982.
- "Police Recruitment in the 80's – Crisis or Opportunity?" *Western City*, May, 1981.
- "Civil Detoxification in Los Angeles," *Police Chief*, August, 1981
- "Professional Police," *California Peace Officer*, 1980.

- "The Elected Public Official Views Police Professionalism," *California Peace Officer*, 1980.
- "A Footbeat Officer's View of Police Work," *Journal of California Law Enforcement*, October, 1979.
- "A Day With Sergeant Maynard Jones," *Police Chief*, April, 1979.
- "Field Sergeants' Administrative Time Utilization," *Journal of California Law Enforcement*, unknown date.
- "Make Your Meetings Successful," *Journal of California Law Enforcement*, April, 1979.
- "Ways To Get That Paper Out Now, Faster and Better," *Journal of California Law Enforcement*, October, 1978.
- "Internal Discipline," "Training," and "Management-Employee Relations," *Police Task Force Report*, National Advisory Commission on Criminal Justice Standards and Goals, United States Department of Justice, U.S. Printing Office, 1973.

URBAN ECONOMIC DEVELOPMENT AND COMMUNITY ACTION GROUPS

During his residence in both Southern California and Florida, Lou Reiter has been active in various programs designed to improve and enhance community and economic development. Some of those activities have included:

- Tallahassee Area Chamber of Commerce and committees on County and City Governments.
- Local committee for district member voting in Leon County.
- Forward Tallahassee.
- Board of Directors, Skid Row Development Corporation. A non-profit organization formed to stimulate redevelopment of the skid row area in Los Angeles, attract funding sources, funnel monies to redevelopment projects and oversee the general plan for this designated area. During the first year originated over $6 million of projects impacting business stimulation and residential housing.
- Board of Governors, Alcohol Detoxification and Rehabilitation Center. In 1976 conducted an extensive management study of this program. The results were implemented and produced an increased intake of public inebriates and reduction in walkout rates.
- Central Business District Redevelopment Project, Skid Row Task Force.
- Greater Van Nuys Chamber of Commerce and member of the Business Improvement Committee and Vitalize Van Nuys, Inc. (a specific economic action project).

COMMUNITY ACTIVITIES

Community activities have been a personal commitment for Lou Reiter. Many of these were in connection

with his duties as a police practitioner. Others were from his personal orientation to the communities in which he has lived. Some of those not previously mentioned have included:

- American Cancer Society
  - Board of Directors and Executive Board, Florida Division.
  - State Crusade Committee, Vice Chair.
  - Chairperson, State Direct Mail and Marketing Subcommittee.
  - President (1986-87) and Board of Directors, Leon County Unit.
  - Trainer, State Volunteer Leadership Development Program.
  - Crusade Chairperson (1982-84) Leon County Unit which increased donations 60% to a record high of $111,000 annually.
- President, Consolidation NOW, a citizens' group advocating the consolidation of governments of Leon County and the City of Tallahassee.
- President (1985) and member Board of Directors (1983-88), Tallahassee Junior Museum. During the year as President the museum received accreditation from the American Association of Museums.
- Chairperson, Airshow '86, Tallahassee's first major airshow. Co-chair, Airshow '87.
- Rotary International
  - Jasper, GA, Rotary (2008-)
  - Providence Rotary (2004-2008)

- Smithfield, RI, Rotary (2002-2004)
- Tallahassee Capital Rotary (1981-1999)
- Paul Harris Fellow (1976)
- Service Above Self/Member of the Year recipient (1986-7)
- Presenter at district and zone conferences
- Past member, Newhall, CA., Rotary
- Creator of the Newhall Rotary Community Service Fund
- Memberships, current and previous:

  Forward Tallahassee, Public Safety Committee

  Florida Economics Club

  Tallahassee Tiger Bay Club

  WFSU-TV committees

  Partners in Excellence, a school/business support program

  1987 Leon County School District "Citizens For Better Schools" Bond Steering Committee

  Florida State University Artists Series, benefactor

  Public Inebriate Task Force, Alcoholism Council of Greater Los Angeles

  Canyon County, CA., Formation Committee

  Vice President and Board of Directors, Santa Clarita Valley Boys and Girls Club

Board of Directors, Tallahassee Informed Parents

Boy Scout Troop 23 Committee

Swannee Area Scout Council Fundraising Committee

Board of Directors, LeMoyne Art Foundation

Member and Director, United Way of Leon County

FORMAL EDUCATION

University of Southern California – Graduate of the Managerial Policy Institute (1980) and graduate study in the Master of Public Administration program.

Pepperdine University – Bachelor of Science in Public Management/Criminal Justice Program.

University of California at Los Angeles – undergraduate study in Political Science.

PERSONAL

Born March 31, 1939, in Minneapolis, Minnesota.

Resident of Georgia since 2008, Rhode Island since 1999 and Tallahassee, Florida, between 1981-1999. Lou Reiter lived in the Los Angeles area for nearly 30 years.

Lou's wife is Marilyn McFadden who is an attorney and was a certified Florida police officer. She currently

specializes as a consultant in law enforcement and prosecution issues of Domestic Violence and is considered one of the leading experts in police employee-related domestic misconduct. They have six (6) grown children one of whom was a police officer with the City of Tallahassee.

LOU REITER TESTIMONY

January, 2006

Terrence Roberts (P), Riverdale, MD., *Prince Jones v. Prince George's County*, CAL 01-03974, T

Robert Bennett (P), Minneapolis, *Ngo v. Minneapolis Police Department*, 03-3376 (RHK/AJB), D

February, 2006

Kathy Levy (D), Albuquerque. *Boyer v. Albuquerque*, CIV 03-997 JB/WDS, T

Michael Haddad (P), Oakland, CA., *Wilkins v. City of Cleveland*, C01-1402MMC, D

March, 2006

Christina Norris (P), Louisville, *Hughes v. Louisville Police*, 3:02CV-60-S, D

Thomas Beko/Mary Margaret Madden (D), Reno/Carson City, *Brown v. Edding*, CV-04-0109-LRH-VPC, T

April, 2006

Jerry Marconi (P), Chicago, *Saponaro v. City of Bellwood*, 98 L 4985, T

May, 2006

Mary Baker (D), Houston, *James v Harris County Sheriff's Department*, 04TRL0131, D

June, 2006

Scott Santos/Paul Bross (P), Melbourne, FL., *Kimbrough v City of Cocoa, FL*, 6:05-CV-471-Orl-31KRS, D

Joel Robbins (P), Phoenix, *Walen v. Vanderpool*, CV05-3036-PHX-EHC, D

Will Smart (P), Seattle, *Howe v. City of Kent and Federal Way*, D

July, 2006

John Alpizar (P), Palm Bay Fl., *Fournier v. Williams*, 05-2033-CA-046089-XXXX-XX, D

James Floyd (D), Tallahassee, FL., *Reddings v. City of Tallahassee*, 05-CA-002099, D

Josh Alex (P), Seattle, *Tuber v. Clift*, D

August, 2006

James Sanford (P), Chicago, *Reynolds v. City of Chicago*, D

Dawn McDonald (P), Springfield, MA., *St. Peter/Bogacz v. Town of Agawam*, 04-30054-MAP, D

September, 2006

Christopher DeLara (P), Albuquerque, *Romero v. City of Gallup*, CIV 05-1240 JP/WDS, D

October, 2006

James Floyd (D), Tallahassee, FL., *Reddings v. City of Tallahassee*, 05-CA-002099, T

Sally Saltzberg (P), Chicago, *Klipfel/Casali v. City of Chicago*, D

Mary Baker/Frank Sanders (D), Houston, *James v. Harris County Sheriff's Department*, 04TRL0131, D

November, 2006

Kathy Levy (D), Albuquerque, *Hall v. City of Albuquerque*, Fed. Ct. 04-0873 JH/RLP, T

Cohen/Guerrin (P), Philadelphia, *Buhalo v. City of Philadelphia*, Fed. Ct. 03-CV-4727, D

Mark Thomsen (P), Milwaukee, *Fields v. City of Milwaukee*, Fed. Ct. 03-C-1450, D

February, 2007

Elliott Weinreb (P), Santa Fe, NM., *Lucero v. Valdez*, CIV-05-0601-JP/WPL, D

March, 2007

Tim Touhy (P), Chicago, *Zagar v. City of Chicago*, 01 L 5176, T

April, 2007

David Robinson (P), Detroit, *Miller v. City of Columbus, OH.*, 2:05-cv-0425, D

May, 2007

Amanda Antholt (P), Chicago, *Arias/Sorokosz v. City of Chicago*, 05 C 5940, D

Lucy France (D), Missoula, MT., *Crawford v. Ravalli County*, DV 01-340, T

June, 2007

Jose Olmo (P), San Juan Puerto Rico, *Colon-Ortiz v. San Juan*, 03-1989 (DRD), T

Jonathan Moore (P), New York City, *Haus v. NYPD*, 03 Civ. 4915, D

Melvin Brooks (P), Chicago, *Davis v. City of Chicago*, 03 L 15299, D

July, 2007

Fred Diamondstone (P), Seattle, *Alley-Barnes v. City of Sackman*, CV 06-0882 TSZ, D

Chuck Geerheart (P), San Francisco, *Crosley v. City of Pittsburg, CA.*, Case No. C05-04051 JSW, D

September, 2007

Ronald Kaye (P), Pasadena, CA., *Gray v. City of Placentia*, Case No., SA CV 06-097 GW (Anx), D

November, 2007

John Muenster (P), Seattle, *Daviscourt v. Counties of Arapahoe and Douglas, CO.*, 05-CV-687-WYD-BND D

February, 2008

John Weist (P), Overland Park, KS., *Moore v. Burr*, 07-CV-4040-RDR, D

March, 2008

Ron Wilson (P), New Orleans, *Turner v. Larpenter*, 02-2234/02-3666, D

Debi Cornwell (P), New York City, *Waters v. Ayer, MA.*, 04-CV-10521-GAO, D

May, 2008

John Burris (P), Oakland, *Espinoza v. San Francisco*, D

July, 2008

Steve Muslin/Craig Sanburg (P), Chicago, *Wilson v. City of Chicago*, D

Cammie Nichols (P), Albuquerque, *Wayne v. Bernalilio County Sheriffs* [sic] *Department*, CIV 07-1255 BB/RLP (D)

September, 2008

Steve Muslin/Craig Sandburg (P), Chicago, *Wilson v. City of Chicago, et al.*, T

Jeffrey Williams/Jaime Torrens (P), Puerto Rico, *Zayas v. Hernandez, et al.*, Civil No: 06-1501 (GAG), D

October, 2008

Jim Sanford, Chicago (P), Chicago, *Reynolds v. City of Chicago*, C.A. No. 02 L 012779, T

John Burris/Ben Nisenbaum (P), Oakland, *DeSantis v. City of Santa Rosa*, C 07 3386 JSW, D

January, 2009

Patrick Malone (P), Washington, DC, *City of Alexandria v. J-W Enterprises, Inc.*, CL07-4117, T

February, 2009

Joel Robbins (P), Phoenix, *Otioti v. Vanderpool*, CV07-443-PHX-SRB, T

April, 2009

Jeffrey Williams/Jaime Torrens (P), Puerto Rico, *Zayas v. Hernandez, et al.*, Civil No: 06-1501 (GAG), T

May, 2009

David Jaffa/Paul Spinella (P), Hartford, *Hernandez v. City of Hartford, et al.*, Civil Action 3:07-CV-00121(MRK), D

Megan Senotori/Eric Farnsworth (P), *Javier v. City of Milwaukee, et al.*, Case No. 07-C-0204, D

June, 2009

Jeffrey Scott (D), Philadelphia, *F.O.P. v. City of Philadelphia CBA Arbitration*, T

Tim Warner (D), Panama City, FL., *King v. City of Panama City*, 5:08-cv-308-RS/MD, D

Charles Pierce (D), Belleville, IL., *Cox v. City of Alton, IL.*, D

November, 2009

Terry Ekl (P), Chicago, IL., *Obryeka v. City of Chicago*, 07 C 2372, D

Randi McGinn (P), Albuquerque, *Costales v. Shultz*, 07 CV 00827, T

January, 2010

Bob Beadel (P). Boston, *Catino v. Ramsey*, Suffolk County Superior Court, T

February, 2010

Peter Coldarchi (P), Chicago, *Bliss v. Chu*, 07-C-1108, D

Donald Bruckner (P), Albuquerque, *Brown v. San Juan County NM*, 09 CV 321 MCA/WDS, D

March, 2010

Phil Davis/C. Nichols (P), Albuquerque, *Buck v. City of Albuquerque*, CIV-04-1000-JP/DJS, T

Neil Chonin (P), Gainesville, FL, *Catron et al v. City of St. Petersburg, FL*, 8:09-CV-00923-EAK-EAJ, D

Rob Jarchi (P), Santa Monica, CA., *Mecozzi, et al. v. City of Los Angeles*, BC377597 CCW, D

June, 2010

Jose Olmo (P), San Juan, PR, *Burgos v. Municipality of Juana Diaz*, 07-1146 (GAG), T

Rob Jarchi (P), Santa Monica, CA., *Mecozzi, et al. v. City of Los Angeles*, BC377597 CCW, T

August, 2010

Megan Senotori (P), Milwaukee, *Javier v. City of Milwaukee, et al.*, Case No. 07-C-0204, T

Judith Berkan (P), San Juan, PR., *Evelyn Ramirez-Lluveras v. Pagan-Cruz*, 08-1466 RLA, D

Albert Farrah (P), Boston, *Santana v. Blanchard*, 07-CV-10275RGS, T

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

– – o0o – –

TERESA SHEEHAN, Plaintiff, vs. CITY AND COUNTY OF SAN FRANCISCO, et al. Defendants.	No. C09-03889 CRB

Deposition of
LOU REITER
January 7, 2011

Reported by:
James Matthews, CSR 7916

TOOKER & ANTZ
COURT REPORTING & VIDEO SERVICES
350 SANSOME STREET, SUITE 700
SAN FRANCISCO, CALIFORNIA 94104
(415) 392-6050

* * *

[62] [Q] Backing up again the hypothetical to make sure you have the facts in mind.

S is on the ground waving the knife back and forth on their back. Do you have that in mind?

A. Yes.

Q. From Officer 2's perspective Officer 1 appears to be within striking distance of the suspect on the ground and that Officer 1 cannot move back to get out of striking distance nor move past S1 without putting herself in harm's way. Do you have that in mind?

A. Yes.

Q. Under those circumstances would it be appropriate for Officer 2 to discharge their firearm at S as S is still a lethal threat to Officer 1?

MR. NISENBAUM: Objection, incomplete hypothetical. I can state why, but – you know – but incomplete hypothetical. The diagram itself is materially incomplete. And I'll leave it at that.

THE WITNESS: Based on what you've said, yes.

MR. LOEBS: Q. Now, under that circumstance with the individual on the ground still wielding the knife and Officer 1 being from Officer 2's perspective within striking [63] distance of the knife, in terms of whether that individual on the ground would pose a lethal threat to Officer 1 from Officer 2's perspective in this instance would it matter whether the individual on the ground was of diminished capacity, had some sort of psychological issue going on?

A. No.

Q. So in that circumstance as I've described, regardless of whether the individual on the ground

had diminished capacity or some sort of mental handicap it would be appropriate for Officer 2 to discharge their firearm at the suspect who's on the ground until the threat had been stopped, correct?

MR. NISENBAUM: Same objection.

THE WITNESS: Based on your hypothetical. Yes.

* * *

[105] MR. LOEBS: Q. Well, then, I'll ask it again when you're done, because you're not answering the question. I mean, the long preamble is not the question. The door is closed. What are you saying they should have done next? All of the other stuff you've included was not answering my question.

MR. NISENBAUM: I don't agree. I think it's argumentative on your end.

MR. LOEBS: I know if we were in trial the judge would have said just answer the question. But we'll do it this way if you want. If you want to keep going on. I'm just going to come back to the same question.

THE WITNESS: Yes. Back up. Go to the front. Have your partner go to the rear to ensure that the person, if you believe that they're going to jump out of the second story window call for responding units, tell them how to respond, tell them that you have a barricaded emotionally disturbed person in

her private residence who has refused to come out. Bring in your negotiators. Bring in your tactical officers. Consistent with their own special order on this provision. And then go through the normal protocol of handling a barricaded subject.

MR. LOEBS: Q. When you say back up, where would you have the one officer who was going to remain in the building – what distance would you have them back up?

[106] A. I would have them go to the bottom of the stairway, because now they're in a position of tactical advantage, and if the person – if Ms. Sheehan had exited her apartment they would have had not only the stairs – she would have had not only the stairs to traverse but the officers could have been in a position to even go outside the front door.

Q. So you'd have the officers actually leave the building and go outside the front door?

A. I said they would go to the bottom of the stairs.

Q. Which stairs?

A. The stairway leading up to the apartments. So they've got a door – they've got steps coming up to the door.

Q. All right.

A. They've got the door [sic] the building. Then they've got a stairway that goes upstairs. So they

position themselves in a position of tactical advantage at the bottom of the stairs.

Q. Okay. So after she closes the door, then what you think an officer should have done in terms of their positioning is they should have retreated and they should have backed up to the bottom of the – the stair landing leading to the floor on which Ms. Sheehan was?

A. Yes.

Q. Okay. And one of the officers should have gone [107] around back?

A. Yes.

Q. And then they should have called to dispatch and coordinated further efforts as you've described?

A. Yes.

Q. Okay. As far as you're aware, do officers have a legal obligation to retreat from an individual who has just threatened them with deadly force?

A. No.

Q. Okay. But that is what you're suggesting in this case?

A. I'm saying you tactically reposition yourself. Retreat in my opinion means get in your car and go home.

Q. Okay.

A. We tactically redeploy all the time. Because we realize we've gotten ourselves in a position of disadvantage. We want to be in a position of advantage. That's what reasonable officers are trained to do. That's not retreat.

Q. And if as a result of backing up down to the first flight of stairs – let me ask you this, if they were at the bottom of the stairs would they be able to even see Ms. Sheehan's door?

A. No.

Q. Okay. So you – the place you suggest they retreat to a location where they can't even see if she's staying [108] inside of her apartment; is that correct?

A. Yes.

Q. And they couldn't even see if she was coming down the hall, correct?

A. Correct. They wouldn't see her until she got to the top of the stairs.

Q. Okay. And – and if Mr. Hodge was wrong and someone else was in the apartment, was in any of the other rooms, then – and if she attacked or assaulted them then that's just the way it goes?

A. That was unfortunate, yes.

Q. That would be what – your proposal, correct?

A. Yes.

Q. But they wouldn't do anything to even confirm the presence or absence of people in the other surrounding rooms before they redeployed to the bottom of the stairs; that's your view?

A. Not at that point, because they've already made the decision to approach her room. They could have done that before they ever approached her room, but they elected not to. But yes, that would be my opinion.

Q. Okay. And if during that time when they back up and down to the stairs where they can't even see her front door, if she escapes in some way that's just the way it goes, too?

[109] A. Yes.

Q. And if she during the time while they're waiting and backing up if she drops her knife and gets a handgun and decides to use her handgun on – shooting at the officers or anyone else that's just the way it goes too?

A. Yes.

Q. That's just a risk you take by the redeployment?

A. Yes.

Q. Okay. And if as opposed to just immediately kicking in the door and getting the visual of Ms. Sheehan to see what she was doing the officers had redeployed to the bottom of the stairwell and that gave her time to get a weapon and shoot an officer,

you'd say, that's unfortunate, but you did the right thing by redeploying, correct?

A. Well, if you've redeployed in a position –

Q. Bottom of the stairs.

A. You're going to be in a position of advantage. Can you be shot? If she got this phantom gun that maybe is in her apartment? There's always that possibility in a barricaded subject situation. It does not happen often.

* * *

[149] Q. With Ms. Sheehan, who – and let's take apart the last shot – whether it was on the ground or not – remove that from the scenario. When the officers discharge all of their shots, other than the last shot which we talked about, at that point in time do you believe when Ms. Sheehan is charging at the officers with a raised knife saying I'm going to kill you that the officers should have taken into account Ms. Sheehan's diminished capacity before making the decision to shoot?

A. No.

Q. In your opinion the officers would be entitled to shoot regardless of Ms. Sheehan's capacity at that point in time, correct?

A. Yes.

Q. At the point in time at which you believe the officers should have behaved differently because of

her diminished capacity is before they used force, correct?

A. Yes.

MR. NISENBAUM: You mean before they shot her, correct? By use of force?

THE WITNESS: Well, that's what I believe. Before [150] they shot at her.

MR. LOEBS: Q. Yes.

A. Made the decision to pull the trigger.

Q. Right.

A. Right.

Q. And before they pepper sprayed her as well.

A. Yes.

MR. NISENBAUM: You're not counting kicking the door?

MR. LOEBS: Q. No, that's not force on an individual. We're talking about a claim for excessive force on an individual. In this case there are only two forces that were used on her, one the pepper spray and two the shots, correct?

A. Yes.

Q. Okay. So with respect to the officers' decisions to use that force you're faulting the officers for failing to take into account her mental deficiencies before the force was used, correct?

A. Yes.

Q. Okay. But at the time when they were making the decision to actually use the force, whether it be the pepper spray or firing shots, then it didn't matter what her mental capacity was, correct?

A. That's correct.

* * *

Volume 1

Pages 1-26

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE
HONORABLE CHARLES R. BREYER, JUDGE

TERESA SHEEHAN, Plaintiff, VS. CITY AND COUNTY OF SAN FRANCISCO, ET AL., Defendants.	NO. C 09-03889 CRB San Francisco, California Friday April 8, 2011 10:20 a.m.

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiff:

LAW OFFICES OF JOHN L. BURRIS
Airport Corporate Centre
7677 Oakport Street
Suite 1120
Oakland, California 94621
BY: BENJAMIN NISENBAUM, ESQ.

For Defendants:

City and County of San Francisco
Office of the City Attorney
1390 Market Street
Sixth Floor
San Francisco, California 94102-5408
BY: PETER KEITH, ESQ.
BLAKE LOEBS, ESQ.

Reported by:
BELLE BALL, CSR #8785, RMR, CRR
Official Reporter, U.S. District Court

Belle Ball, CSR #8785, RMR, CRR
Official Reporter – U.S. District Court
(415) 373-2529

[2] **FRIDAY, APRIL 8, 2011** **10:20 A.M.**

PROCEEDINGS

THE CLERK: Calling Case C-09-3889, Teresa Sheehan versus City and County of San Francisco.

Appearances, Counsel.

MR. KEITH: Your Honor, Peter Keith and Blake Loebs on behalf of the Defendants.

MR. NISENBAUM: Good morning, Your Honor. Ben Nisenbaum on behalf of the Plaintiff.

THE COURT: Either side have anything more they want to say?

MR. KEITH: Your Honor, we said our piece in the reply brief. We think that we covered all of the counter arguments that the Plaintiff made.

The facts are undisputed. We think summary judgment is appropriate here,

MR. NISENBAUM: I would like to add a little bit, Your Honor.

THE COURT: (Nods head)

MR. NISENBAUM: Defendants argue that this is a case of tactics. What it really is is a case of action. It's a case of what was done, in full knowledge of Ms. Sheehan's condition. In full knowledge of Ms. Sheehan's mental state.

And I would say there's one other point that maybe wasn't very clear in the brief. Part of this involves, [3] obviously, the forceful opening of a door, forcefully throwing a person's body weight against a door in full awareness the person behind the door is in the mental state that they're in, et cetera.

THE COURT: Do you think that's a bad idea? Going into a room – that they shouldn't have used force to go in the room? That's your position?

MR. NISENBAUM: That's part of my position.

THE COURT: In other words, somebody who's inside a room, apparently deranged, threatening people with a knife, not appearing for long periods of time, it's your position that what you want the police to do is not go in.

That's your position.

MR. NISENBAUM: It's my position that there is the proper way to go in, and a way that is, in the face of these circumstances, unconstitutional.

And, I would say this –

THE COURT: Do you want them to go in, or not?

MR. NISENBAUM: Your Honor, what I want is for her – her disability to be taken into consideration.

THE COURT: Yes. By the way, that cuts the other way, of course.

I mean, that's the interesting thing about it, is that somebody who is mentally deranged would be less likely to act in a rational way than somebody who is not mentally [4] deranged.

MR. NISENBAUM: Exactly.

THE COURT: And therefore, it may be called upon law enforcement to, even when they do take that into account, not to expect rational responses. And one irrational response that they ought to expect is violence. That's what experience tells us.

But, Mr. Nisenbaum, you don't want them to go in.

MR. NISENBAUM: No, I don't want them to go in, in that way, in the way that they did.

THE COURT: Well, what way do you – what way do you want them to go in?

MR. NISENBAUM: What I think would be appropriate under these circumstances is that you don't open the door at that time. She's not a danger.

THE COURT: No. Don't tell me what they did was wrong. You tell me – I'm asking you, what do you think they should have done?

MR. NISENBAUM: What I think they should have done was called out the appropriate personnel, people who could talk to her, people who could talk to her in a reasonable way. Potentially, you could call in family members. You could take your time. You could have patience.

But the key point – look, the point of it is, Your Honor –

[5] THE COURT: They didn't break in right away. There were two or three trips back to her apartment, weren't there?

MR. NISENBAUM: I'm sorry; say that again?

THE COURT: There were several times they went to her apartment. This was over some period of time, wasn't it?

MR. NISENBAUM: No.

THE COURT: Oh, then it was done instantaneously.

MR. NISENBAUM: Your Honor –

THE COURT: Wasn't it? Wait a minute.

MR. NISENBAUM: No, the officers arrived. We're – we're dealing with these officers, right?

THE COURT: No, wait. Yeah, but they didn't just arrive *sua sponte*. They arrived in response to something, didn't they?

MR. NISENBAUM: Of course. They arrived in response to Mr. Hodge's call.

THE COURT: And, what was that? What occasioned that?

MR. NISENBAUM: What occasioned that was that she reportedly hadn't been eating, hadn't been seen for – for some period of time, and was basically missing her groups.

And ultimately, so what happens is, obviously, Mr. Hodge goes to – goes to her room. She tells him, "Get out." He keys into her room with Mr. Creeger. She tells him to get out, says she has a knife.

[6] THE COURT: Why don't we read what the facts are, rather than just sort of making them up.

MR. NISENBAUM: I'm not making them up at all.

THE COURT: (As read)

> "On August 5th, a social worker went to the house, a cooperative housing program for adults in need of mental health support, to check on the status of Plaintiff's need. While there, Hodge knocked on the Plaintiff's door and said through the door that he was concerned about Plaintiff's health, that

he would return in a few days if she did not open the door. The Plaintiff did not respond."

Okay?

MR. NISENBAUM: Okay.

THE COURT: (Continuing)

"On August 7, Hodge returned to Conrad [sic] House to check Plaintiff's house. Once there, Hodge knocked on Plaintiff's door, announced himself, explained that he wanted to check in on her, and that he would enter the room if she did not respond. After hearing no response, Hodge, with the assistance of the property manager, opened Plaintiff's [7] apartment door."

Anything wrong with any of that?

MR. NISENBAUM: This is Hodge. This is not a Defendant.

THE COURT: Any –

MR. NISENBAUM: No. No. There's nothing wrong.

THE COURT: All right. We'll get along a lot better if you just answer my questions. All right?

MR. NISENBAUM: Absolutely.

THE COURT: (Continuing)

"Once inside, Hodge observed Plaintiff laying on her bed with a book resting on her face,

then attempted to engage Plaintiff by asking her if she was okay."

Anything wrong with that?

MR. NISENBAUM: Of course not.

THE COURT: (Continuing)

"After initially not responding, Plaintiff leaped out of her bed, yelled for Hodge to leave her room, threatening to kill him with a knife if he did not."

Anything wrong with that?

MR. NISENBAUM: Not on Mr. Hodge's part.

THE COURT: All right.

"Hodge left the room."

[8] Is that the right thing for him to do?

MR. NISENBAUM: Absolutely.

THE COURT: All right.

"Told other residents to leave the building."

Was that the right thing to do?

MR. NISENBAUM: Absolutely.

THE COURT: All right.

"And then went to his car to seek assistance."

Is that the right thing to do?

MR. NISENBAUM: Absolutely.

THE COURT: (Continuing)

"Hodge called the police to help him place Plaintiff under a 72-hour detention under California Welfare and Institutions Code Section 5150."

Is that the right thing to do?

MR. NISENBAUM: Yes.

THE COURT: (Continuing)

"Shortly after the call, Officer Holder arrived at Conrad [sic] House to assist Hodge."

Is the cop doing the right thing?

MR. NISENBAUM: No doubt about it.

THE COURT: Could he have gone?

MR. NISENBAUM: She is fine.

[9] THE COURT: Pardon? She. The officer is wrong.

MR. NISENBAUM: No, I said she's fine.

THE COURT: Oh, okay. All right.

So:

"Because Officer Holder had never helped a social worker effectuate a 5150 arrest, she called her street sergeant, Kimberly Reynolds, for help."

Is that the right thing to do?

MR. NISENBAUM: Of course.

THE COURT: (Continuing)

"Upon arrival, Officer Reynolds spoke with Hodge, verified that he had the authority to make such arrest, and examined the 5150 form that had been filled out. The form stated, quote, 'Client has been without psychotropic meds times one and a half years. Has been presenting with increased symptoms for several weeks. Client has not been seen by the house counselor two times week.

Housemates reported the client has been coming and going at odd hours, reportedly said she has stopped eating. It also reported that client had been wearing the same clothes for several days. Writer [10] conducted outreach to client and she was not responsive, made no sound behind her closed door. Writer and property management keyed in for a wellness check. Client, upon opening the door, was found lying on her bed, book over her face, eyes open, not responsive. Addressed client several times, and she did not move or answer. Client then suddenly got up, threw the covers, and yelled at the writer violently, 'Get out of here. You don't have a warrant. I have a knife, and I'll kill you if I have to. Client then slammed her door and locked it behind.'"

Okay. That's the report.

MR. NISENBAUM: Correct.

THE COURT: Okay.

MR. NISENBAUM: That's what –

THE COURT: Also on the form:

"Officer Reynolds observed that 'Hodge had checked the 'Gravely Disabled' and 'Danger to Herself or Others' boxes to indicate the basis for a 5150 detention."

Right?

MR. NISENBAUM: Okay.

THE COURT: Makes sense.

[11] "After speaking with Hodge and examining the 5150 form, Officer Reynolds decided to make contact with Plaintiff to verify whether she met the criteria for detention under Section 5150. After giving Reynolds a key to Plaintiff's room, Hodge led both officers to Plaintiff's apartment door located at the end of a 7-shaped hallway on the second floor. Once at the door, Officer Reynolds knocked and inserted the key into the door, at the same time told Plaintiff, 'We are the police. We want to help.' And then pushed open the door."

Was that the right thing to do? Or was that mistake number one?

MR. NISENBAUM: Look, it's not – that's not –

THE COURT: No, I'm going to go piece by piece by piece.

MR. NISENBAUM: Okay, okay.

THE COURT: Because that's the way it works.

MR. NISENBAUM: Fair enough. I don't have a quarrel with the first door opening.

THE COURT: Okay. (Continuing)

> "When the door opened, Plaintiff jumped out of bed, screamed for the officers to leave [12] her unit. While moving towards the officers, Plaintiff picked up a large kitchen knife and threatened to kill the police officers. The officers retreated backwards, and one of them closed the door."

MR. NISENBAUM: No. She closed the door. Ms. Sheehan closed the door.

THE COURT: Well, somebody closed the door.

MR. NISENBAUM: Ms. Sheehan closed the door.

THE COURT: She did. She's there, screaming at the police with a knife in her hand. She closes the door. Okay?

MR. NISENBAUM: There you have it.

THE COURT: That's what the police saw.

MR. NISENBAUM: Correct.

THE COURT: Okay.

"Thereafter, the police officers called for backup."

Was that the right thing to do?

MR. NISENBAUM: Without a doubt.

THE COURT: (Continuing)

"Drew their department-issued weapon."

By the way, is that the right thing to do?

MR. NISENBAUM: Now we start to have issues.

THE COURT: No, I'm asking you. You don't think they [13] should draw their weapons?

MR. NISENBAUM: Well, they're outside the room.

THE COURT: Should they – so, you're saying that that's a mistake.

MR. NISENBAUM: What I would say, Your Honor, if I could respond to that very particularly, if the officers are contemplating waiting for backup to arrive with less lethal, in the event that she opens the door and comes out at them, then okay.

But –

THE COURT: So they should wait until she emerges through the door with the knife, and then draw their weapon.

MR. NISENBAUM: There's no indication that she's going to emerge through the door with the knife. She closed the door upon them. She slammed the door closed.

THE COURT: You say that was a mistake. The officers made a mistake. They should not have drawn their weapon.

MR. NISENBAUM: You characterize it as mistake.

THE COURT: Well –

MR. NISENBAUM: What I'm saying is it depends upon what the subsequent conduct of the officers is.

THE COURT: No, no. That is – you go to the end, and then you work back to the beginning. That's not the way life works. The way life works, you go to the beginning, and you keep on going through a series of events.

[14] And if you say they shouldn't have done X, you're saying that not with hindsight; you have to say it based upon the events that occurred up to that point.

And, you're saying they shouldn't have drawn their weapons.

MR. NISENBAUM: No. You're mischaracterizing what I'm saying. It depends upon what the contemplation of the next step is.

If they're drawing their weapons to go in, but without waiting for backup or less lethal when they know it's on the way, if they're drawing their weapons to go in, they're completely disregarding her disability. Completely. Because they know she's not complying.

But she hasn't indicated –

THE COURT: So you now have a person who is deranged, who is with a knife, who is in deep psychological problems.

And, you're saying that they shouldn't have gone into the room.

MR. NISENBAUM: I'm saying that once they confirm or clearly it appears that there's no one else in the room who's in danger, there's no – the only – the only thing that can happen by going into the room in which – and the way in which they go into the room is a shooting.

I mean, you can't suddenly expect her to suddenly just come to her senses, and drop the knife, and say "Okay."

[15] THE COURT: No, I agree with that. I agree that maybe she wouldn't have dropped the knife. How do we know she wouldn't have hurt herself?

MR. NISENBAUM: There's no indication of that anywhere in the record. There is [sic] no facts to support that. That is pure speculation by the officers.

THE COURT: Pure speculation that a person under 5150 isn't a danger to themselves?

MR. NISENBAUM: Well, there's no indication from anyone that suicide was an issue here.

THE COURT: Well, suicide. She's mentally deranged.

MR. NISENBAUM: I don't think you can lump – I don't think you can simply say that a person who's mentally deranged is –

THE COURT: Well, they should have had an analysis as to whether she was suicidal? Like, "Let's have a – let's give her some therapy to see whether she has thoughts of suicide"?

She's carrying – she has a butcher knife, and she's screaming. And she's not coming out, and not taking care of herself.

And you're saying there's no evidence that would suggest that she's a danger to herself.

MR. NISENBAUM: What I'm saying is she's not an immediate danger to herself. She's not –

THE COURT: How do you know that?

[16] MR. NISENBAUM: Because there – look. Mr. Hodge tells them –

THE COURT: Speaking about speculation, speaking about speculation, why aren't you speculating that she's not a danger to herself?

MR. NISENBAUM: It would be speculation to say otherwise, Your Honor.

The question is: What facts do the police have? They have facts –

THE COURT: Okay. I read to you what the facts were.

MR. NISENBAUM: Okay, those were the facts. And none of that –

THE COURT: She was not taking care of herself.

MR. NISENBAUM: Correct.

THE COURT: She had threatened people. She had the means of hurting herself and others. She had the means. And she was deranged. Those are the facts.

MR. NISENBAUM: So, Your Honor –

THE COURT: Those are the facts.

MR. NISENBAUM: So, Your Honor, the question then is: Who is she hurting while she's isolated in her room?

THE COURT: She could hurt herself.

MR. NISENBAUM: But there's no indication – that's the point. There's [sic] no facts –

THE COURT: Excuse me, Mr. Nisenbaum. There are [17] many, many cases – many, many cases of people who are deranged who harm themselves.

MR. NISENBAUM: And oftentime, Your Honor, in those cases, there is some precedent of a statement, of a social worker saying she has a history of suicide, or someone who knows saying "I'm scared that she wants to hurt herself." Or the person making a statement –

THE COURT: It's your view that they should not have gone into the room.

MR. NISENBAUM: The second opening of the door –

THE COURT: Yeah.

MR. NISENBAUM: – at the time that it occurred, in the way in which it occurred, is really the issue.

THE COURT: I see. Okay. Anything further?

MR. NISENBAUM: Well, again, Your Honor, what – what I would say is that there are cases that the Defendants relied upon that are inapposite.

For example, you have *Fisher versus City of San Jose*. That's a person with a gun, who says he has 18 guns in the home. That's a person who can hurt other people through – from inside his home. There's no indication that Ms. Sheehan had that capability, whatsoever. In her room, she's not a danger.

But, I would say this. The Court says, "Well, she could be suicidal." Well, what is this? If you go in there in [18] the way that they did, you essentially ensure that a shooting happens. Because, once again, you are disregarding – you are disregarding her disability –

THE COURT: You are suggesting that it just should have been a standoff. You're suggesting they should have just simply parked outside the room, because you say she wasn't – there's no evidence that she was a danger to herself. Therefore, they shouldn't have gone in, because their going in provokes her to do something, so they should have just sat and waited it out.

I understand that's your position. They should have just waited it out.

MR. NISENBAUM: There's nothing wrong with patience, Your Honor. But, more importantly is this.

THE COURT: We're not talking about virtues. We're talking about what should have been done. And it's – it's your position that she should – that the police officers, in light of all of this, should not have entered the room. That's your position.

MR. NISENBAUM: My position, Your Honor, is that even from Officer Reynolds, the – the Plaintiff's disability played no role, it was not a factor in her decision to open the door. She says that. And, and now –

THE COURT: So, Mr. Nisenbaum, is it your position that the police should have gone in, or not gone in?

[19] MR. NISENBAUM: I don't – the second time we're referring to?

THE COURT: Yes,

MR. NISENBAUM: Oh. These Defendants, at that time, no, they should not have. And that's very clear.

THE COURT: They should have waited outside.

MR. NISENBAUM: That's very clear. But it's not a tactical issue. It's an issue of – of the Fourth Amendment. It's an issue of using excessive force in making the entry, like in *Alexander*, the second entry I'm referring to now.

It's also an issue at the end of the day of completely disregarding her disability. And it's a known disability –

THE COURT: No. I'm sorry, Mr. Nisenbaum. It cuts absolutely the other way. The fact that she is disabled suggests that she's not going to act in a rationale [sic] way. Everything about it, everything about this case suggests that she wasn't rational.

And, and that's true. We know that's true. We know it's true. It's not even hindsight. She wasn't rational. She was – she was a sick person.

MR. NISENBAUM: Okay.

THE COURT: You say, all right, given the fact she was sick, the police shouldn't have done what they did. That's your position.

[20] MR. NISENBAUM: Exactly.

THE COURT: Okay.

MR. NISENBAUM: That's my position. And I have a further position as well. I don't know if the Court wants to discuss it.

It's been agreed, there is a last shot after she's fallen to the ground. The shot is to Ms. Sheehan's head. It's clear that she's on the ground when that shot happens. There's no reason for that shot to have occurred.

Reynolds – I'm sorry, Holder didn't shoot her at that time; Zachos didn't shoot her. There is no reason for that last shot to have occurred. And that is excessive, as well.

THE COURT: Okay.

MR. NISENBAUM: In any event.

THE COURT: Thank you.

Mr. Keith, do you want to respond?

MR. KEITH: Yes, Your Honor.

With regard to the second entry, we agree with the Court that the officers did the right thing. But

that's not even the legal question. The question is was there justi- – can we establish justification under the Fourth Amendment to make that second entry.

For three reasons, there were. First, the same exigent circumstances in community caretaking exception, all [21] the facts that supported that. And exceptions that Plaintiffs concede applied to the first entry also continue to support the second entry.

We cited the *Fisher versus City of San Jose* case not because we thought the facts were similar, but because it states that – the rule of law, that once there is exigent circumstances to make a seizure, the officers have a continuing right to make that seizure.

The second –

THE COURT: I think it goes even further. I think they have a duty. See, that's what concerns me.

And, and, and, you know, had that woman injured herself, you know, I would be listening to the argument, you know, "Why didn't the police do something? They knew what the circumstances were. We employ them to – to protect the safety of the public, including the victims. Why didn't they do something?"

That's the argument you hear.

MR. KEITH: Your Honor, as a Deputy City Attorney, I frequently hear arguments that a public entity had a duty to protect the –

THE COURT: It's almost the rule of – of hindsight. You look at it, you see what happens, you take the opposite. Okay.

MR. KEITH: And then, the other reasons why the entry [22] was lawful under the Fourth Amendment is that those existing justifications became even stronger, because in the intervening time, Sheehan, herself, attacked the officers with a knife and threatened to kill them. So, everything that they'd seen already, those facts were only further confirming.

And finally, she just –

THE COURT: No, the argument is that seeing the police officers, holding the knife, seeing that she's going to kill the police officers doesn't justify the police officers in doing anything other than waiting.

MR. KEITH: That is Plaintiff's argument.

THE COURT: That's the argument. Other than waiting to see what will happen.

MR. KEITH: Our argument –

THE COURT: And maybe she will be returned to sanity. And then, and then, act in a rational way.

MR. KEITH: Right, Your Honor. And then, our third argument why this entry was correct, the second entry was correct under the Fourth Amendment is the same assaulting of the officers with a knife is a felony; she was fleeing.

Under *U.S. versus Santana*, it's proper – a person can't just assault somebody and run into their home and call it unlawful entry when officers pursue them.

So, Your Honor, with regard to the claim that the entry, itself, was made by excessive force, we don't have any [23] flash-bang or compression grenades here. I mean, this is a locked door that officers are trying to force open with a shoulder. I don't think there's any argument that the force involved in the entry, itself, is excessive.

I mean, given that the Fourth Amendment justified the entry under the *Billington* case, you don't even start to question tactical issues. And that's exactly what Plaintiff is questioning, is essentially not arguing about the lack of a Fourth-Amendment justification to enter. He's arguing that it was just a bad decision to enter. We disagree with that, too, but it's a discussion that's not even legally pertinent for purposes of the entry.

And finally, with regard to the force, Plaintiff made a statement that – Plaintiff said it was clear that Ms. Sheehan was on the ground when the last bullet struck her. Well, to say "It was clear" doesn't really state the facts.

This is a fast-moving incident. The shots were all fired in close succession. Ms. Sheehan was in striking distance, and had trapped Officer Holder. Facts that Plaintiff concedes.

I will say that resolving the factual disputes in favor of the Plaintiff, Ms. Sheehan was on the ground at the time that that final bullet struck her. But that doesn't mean that we impose 20/20 hindsight and say, "Well, Sergeant Reynolds, you are legally bound to stop firing at Ms. Sheehan [24] the moment that, you know, her knee touches the ground," as if we were in a game of football, and playing by football rules.

Your Honor, the – Ms. Sheehan, when she got to the ground, she was still waving the knife, she was still within striking distance, and had trapped Officer Holder. The reason Officer Zachos didn't fire at Ms. Sheehan was because he was afraid he was going to shoot Officer Holder, who was trapped. That was his testimony.

So this final shot that Plaintiff brings out there, I mean, this whole incident is an unfortunate incident. It's a sad incident, and we can only have sympathy for Ms. Sheehan.

But the question here is, under the Fourth Amendment, number one, was this a reasonable use of force, based on the facts known to the officers and the split-second decisions they had to make. And number two, did any law clearly establish that the officers couldn't use this force.

We cited a whole series of cases that approved similar uses of force. Plaintiff hasn't come forward with any case that said that this type of force in this factual circumstance is improper.

And, even the Ninth Circuit, itself, recognizes the distinction between an assaultive and armed mentally ill person against whom it is proper to use deadly force, and then a mentally ill person whose actions might be explained by their mental illness but they're not armed, and so they don't pose a [25] threat.

The Ninth Circuit has made that distinction for us. And we really don't need to go any further than that distinction.

THE COURT: So what is not in dispute – well, while it's in dispute as to whether or not she was on the ground, but giving the – the Plaintiff his due with respect to a summary judgment motion, assuming she was on the ground, what isn't in dispute was the rapidity in which these events occurred.

MR. KEITH: That's correct.

THE COURT: And, and that it was all part and parcel of the same incident occurring very, very quickly under these circumstances. That's not in dispute.

MR. KEITH: And significantly, Your Honor, it is not in dispute that Officer Holder was trapped against that alcove with Ms. Sheehan waiving [sic] the knife around, who, by her own testimony, said she was doing it to fend off the officers.

THE COURT: So that's not in dispute. Okay.

Mr. Nisenbaum, anything further?

MR. NISENBAUM: Other than that I disagree with the characterization of the legal analysis that is to be applied, and it looks like that it will have to be further litigated.

So, thank you.

THE COURT: Okay. Submitted. Thank you.

All dates are vacated. I'm going to issue a ruling. [26] Okay.

MR. KEITH: Thank Your Honor.

MR. LOEBS: Thank Your Honor. (Proceedings concluded)

CERTIFICATE OF REPORTER

I, BELLE BALL, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in C 09-03889 CRB, Teresa Sheehan v. City and County of San Francisco, et al., were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing.

The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

/s/ *Belle Ball*

Belle Ball, CSR 8785, RMR, CRR

Thursday, July 28, 2011

SUPREME COURT, U.S.
FILED
JAN - 9 2015
OFFICE OF THE CLERK

No. 13-1412

In The Supreme Court of the United States

CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, *et al.*,

Petitioners,

v.

TERESA SHEEHAN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX VOLUME 2

SAN FRANCISCO CITY ATTORNEY'S OFFICE
DENNIS J. HERRERA
City Attorney
CHRISTINE VAN AKEN
Chief of Appellate Litigation
BLAKE P. LOEBS
PETER J. KEITH*
Deputy City Attorneys
1390 Market Street, 7th Floor
San Francisco, CA 94102
(415) 554-3908
peter.keith@sfgov.org

Counsel for Petitioners
* *Counsel of Record*

LEONARD J. FELDMAN*
PETERSON WAMPOLD ROSATO LUNA KNOPP
1501 4th Avenue
Suite 2800
Seattle, WA 98101
(206) 624-6800
feldman@pwrlk.com

Counsel for Respondent
* *Counsel of Record*

[Additional Counsel For Respondent On Inside Cover]

Petition For Certiorari Filed May 22, 2014
Certiorari Granted November 25, 2014

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

JILL BOWMAN
STOEL RIVES LLP
600 University Street
Suite 3600
Seattle, WA 98101
(206) 624-0900
jdbowman@stoel.com

BEN NISENBAUM
LAW OFFICES OF JOHN L. BURRIS
7677 Oakport Street
Suite 1120
Oakland, CA 94621
(510) 839-5200
bnisenbaum@johnburrislaw.com

Counsel for Respondent

TABLE OF CONTENTS

Page

Volume 2 (Exhibits)

Exhibit 103 – Application for 72-Hour Detention
[from Testimony of Heath Hodge, Reporter's Transcript of Videotaped Deposition, *Sheehan v. City and County of San Francisco et al.*, N. D. Cal. No. C09-03889 CRB (Oct. 14, 2010), filed at Dist. Ct. Dkt. No. 48-3] 397

Exhibit 104 – Photograph of Knife
[from Testimony of Heath Hodge, Reporter's Transcript of Videotaped Deposition, *Sheehan v. City and County of San Francisco et al.*, N. D. Cal. No. C09-03889 CRB (Oct. 14, 2010), filed at Dist. Ct. Dkt. No. 48-3] 399

Exhibit 121 – Photograph of Outside Door
[from Testimony of Officer Constantine Zachos, Reporter's Transcript of Deposition, *Sheehan v. City and County of San Francisco et al.*, N. D. Cal. No. C09-03889 CRB (Oct. 29, 2010 p.m.), filed at Dist. Ct. Dkt. No. 48-5] 400

Exhibit 122 – Photograph of Stairway
[from Testimony of Officer Constantine Zachos, Reporter's Transcript of Deposition, *Sheehan v. City and County of San Francisco et al.*, N. D. Cal. No. C09-03889 CRB (Oct. 29, 2010 p.m.), filed at Dist. Ct. Dkt. No. 48-5] 401

Exhibit 124 – Photograph of Scene
[from Testimony of Officer Constantine Zachos, Reporter's Transcript of Deposition, *Sheehan v. City and County of San Francisco et al.*, N. D. Cal. No. C09-03889 CRB (Oct. 29, 2010 p.m.), filed at Dist. Ct. Dkt. No. 48-5] 402

Exhibit 125 – Photograph of Scene
[from Testimony of Officer Constantine Zachos, Reporter's Transcript of Deposition, *Sheehan v. City and County of San Francisco et al.*, N. D. Cal. No. C09-03889 CRB (Oct. 29, 2010 p.m.) [filed at Dist. Ct. Dkt. No. 48-5] 403

Exhibit 128 – Photograph of Knife
[from Testimony of Officer Constantine Zachos, Reporter's Transcript of Deposition, *Sheehan v. City and County of San Francisco et al.*, N. D. Cal. No. C09-03889 CRB (Oct. 29, 2010 p.m.), filed at Dist. Ct. Dkt. No. 48-5] 404

TABLE OF CONTENTS – Continued

Page

Exhibit 129 – Photograph of Knife With Measuring Device
[from Testimony of Officer Constantine Zachos, Reporter's Transcript of Deposition, *Sheehan v. City and County of San Francisco et al.*, N. D. Cal. No. C09-03889 CRB (Oct. 29, 2010 p.m.), filed at Dist. Ct. Dkt. No. 48-5] 405

Exhibit 140 – Diagram of Scene
[from Testimony of Officer Constantine Zachos, Reporter's Transcript of Deposition, *Sheehan v. City and County of San Francisco et al.*, N. D. Cal. No. C09-03889 CRB (Oct. 29, 2010 p.m.), filed at Dist. Ct. Dkt. No. 48-5] 406

Exhibit A – Computer Automated Dispatch Event History Detail
[from Testimony of Officer Kathrine Holder, Reporter's Transcript of Deposition, *Sheehan v. City and County of San Francisco et al.*, N. D. Cal. No. C09-03889 CRB (Nov. 2, 2010), filed at Dist. Ct. Dkt. 48-2] 407

Exhibit K – Photograph of Scene
[from Testimony of Officer E. R. Balinton, Reporter's Transcript of Deposition, *Sheehan v. City and County of San Francisco et al.*, N. D. Cal. No. C09-03889 CRB (Oct. 27, 2010), filed at Dist. Ct. Dkt. No. 48-7] 409

Exhibit (no number) – Diagram of Scene
[from Examination Report of James L. Norris (Dec. 10, 2010), filed at Dist. Ct. Dkt. 45-5] 410

Exhibit No. 103
Date: 10/14/10
Witness: Hodge
Julieann Hamill, CSR 5151

State of California – Health and Welfare Agency | Department of Mental Health

APPLICATION FOR 72-HOUR DETENTION FOR EVALUATION AND TREATMENT

Confidential Client/Patient Information
– See California W & I Code Section 5328

MH-302 (8/98)

W & I Code, Section 5157, requires that each person when first detained for psychiatric evaluation be given certain specific information orally, and a record be kept of the advisement by the evaluating facility.

☐ **Advisement Complete** ☐ **Advisement Incomplete**

Good Cause for Incomplete Advisement

DETAINMENT ADVISEMENT

My name is _____
I am a (Peace Officer, etc.) with (Name of Agency): You are not under criminal arrest, but I am taking you for examination by mental health professionals at (Name of Facility)
You will be told your rights by the mental health staff.
If taken into custody at his or her residence, the person shall also be told the following information in substantially the following form:
You may bring a few personal items with you which I will have to approve. You can make a phone call and/or leave a note to tell your friends and/or family where you have been taken.

Advisement Completed By	Position	Date

To _____

Application is hereby made for the admission of TERESA SHEEHAN

residing at 1941 15TH ST. – CONARD HOUSE COOPS, California, for 72-hour treatment and evaluation pursuant to Section 5150, (adult) et seq. or Section 5585 et seq. (minor), of the Welfare and Institutions Code. If a minor, to the best of my knowledge, the legally responsible party appears to be/is: (Circle one) Parent; Legal Guardian; Juvenile Court as a WIC 300; Juvenile Court as WIC 601/602; Conservator. If known, provide names, address and telephone number: _____

* * * * * * * * * * *

The above person's condition was called to my attention under the following circumstances: (See reverse side for definitions)

CLIENT HAS BEEN WITHOUT PSYCHOTROPIC MEDS X 1½ YRS. HAS BEEN PRESENTING WITH INCREASED SXS FOR SEVERAL WEEKS. CLIENT HAS NOT BEEN SEEN BY THE HOUSE COUNSELOR X 2 WEEKS. HOUSEMATES REPORTED THAT CLT. HAS BEEN COMING AND GOING AT ODD HOURS AND REPORTEDLY SAID SHE HAD STOPPED EATING. IT WAS ALSO REPORTED THAT CLIENT HAS BEEN SEEN WEARING THE SAME CLOTHING FOR SEVERAL DAYS. WRITER CONDUCTED OR TO CLIENT AND SHE WAS NOT RESPONSIVE MADE NO SOUND BEHIND HER CLOSED DOOR. WRITER AND PROPERTY MANAGEMENT KEYED IN FOR WELLNESS CHECK – CLIENT –> SEE BELOW CONT:

The following information has been established: (Please give sufficiently detailed information to support the belief that the person for whom evaluation and treatment is sought is in fact a danger to others, a danger to himself/herself and/or gravely disabled.)

UPON OPENING THE DOOR, CLIENT WAS FOUND LYING IN HER BED WITH A BOOK ON HER FACE, EYES OPEN AND WAS NOT RESPONSIVE. ADDRESSED CLT. SEVERAL TIMES AND SHE DID NOT MOVE OR ANSWER – CLIENT THEN SUDDENLY GOT UP, THREW THE COVERS, AND YELLED AT WRITER VIOLENTLY: "GET OUT OF HERE! YOU DON'T HAVE A WARRANT! I HAVE A KNIFE, AND I'LL KILL YOU IF I HAVE TO!" CLIENT THEN SLAMMED HER DOOR AND LOCKED IT BEHIND HER.

Based upon the above information it appears that there is probable cause to believe that said person is, as a result of mental disorder:

☐ **A danger to himself/herself.** ☑ **A danger to others.** ☑ **Gravely disabled adult.** ☐ **Gravely disabled minor.**

Signature title and badge number of peace officer, member of attending staff of evaluation facility or person designated by county.	Date	Phone
/s/ HEATH HODGE, MSW	8/7/08	346-6389
	Time: 11:15 AM	

Name of Law Enforcement Agency or Evaluation Facility/Person	Address of Law Enforcement Agency or Evaluation Facility/Person

☐ Weapon was confiscated and detained person notified of procedure for return of weapon pursuant to W & I Code Section 8102. (officer/unit & phone #) _____

NOTIFICATIONS TO BE PROVIDED TO LAW ENFORCEMENT AGENCY

NOTIFICATION OF PERSON'S RELEASE FROM AN EVALUATION AND TREATMENT FACILITY IS REQUESTED BY THE REFERRING PEACE OFFICER BEACUSE [sic]:

☐ Person has been referred under circumstances in which criminal charges might be filed pursuant to W & I Code Sections 5152.1 and 5152.2.
Notify (officer/unit & phone #) _____

☐ Weapon was confiscated pursuant to W & I Code Sections 8102.
Notify (officer/unit & phone #) _____

SEE REVERSE SIDE FOR INSTRUCTIONS

Exhibit No. 104
Date: 10/14/
Witness: Hodge
Julieann Hamill,
CSR 5151

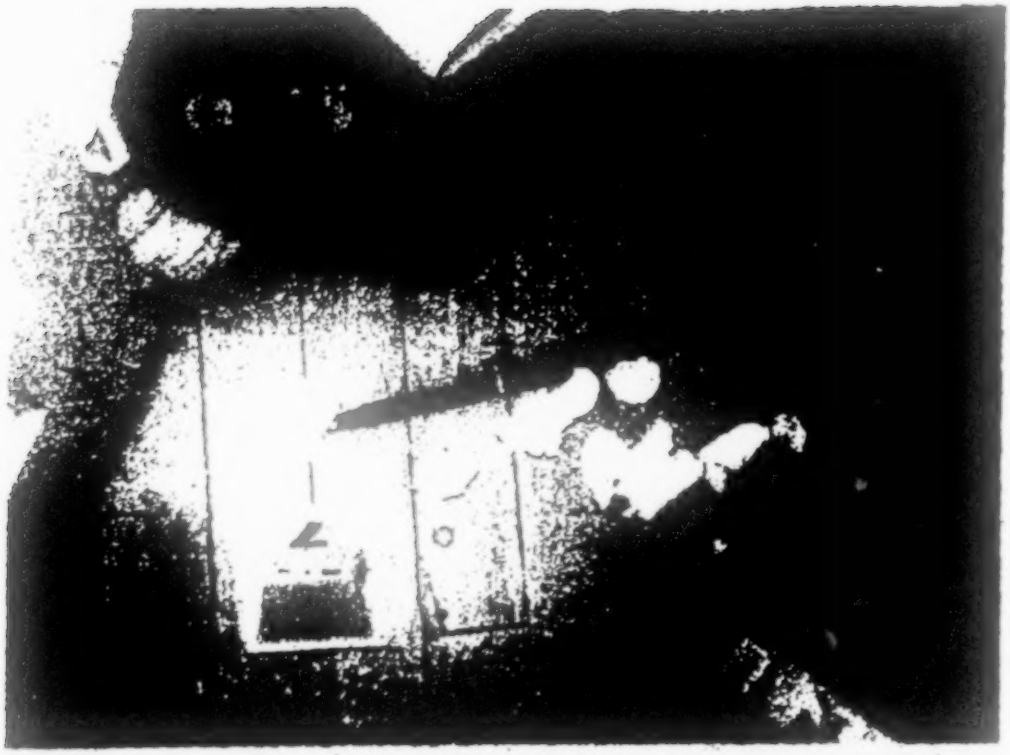


EXHIBIT 121
ZACHOS 10/29

EXHIBIT 122
ZACHOS 10/29

EXHIBIT 124
ZACHOS 10/29

EXHIBIT 125
ZACHOS 10/29

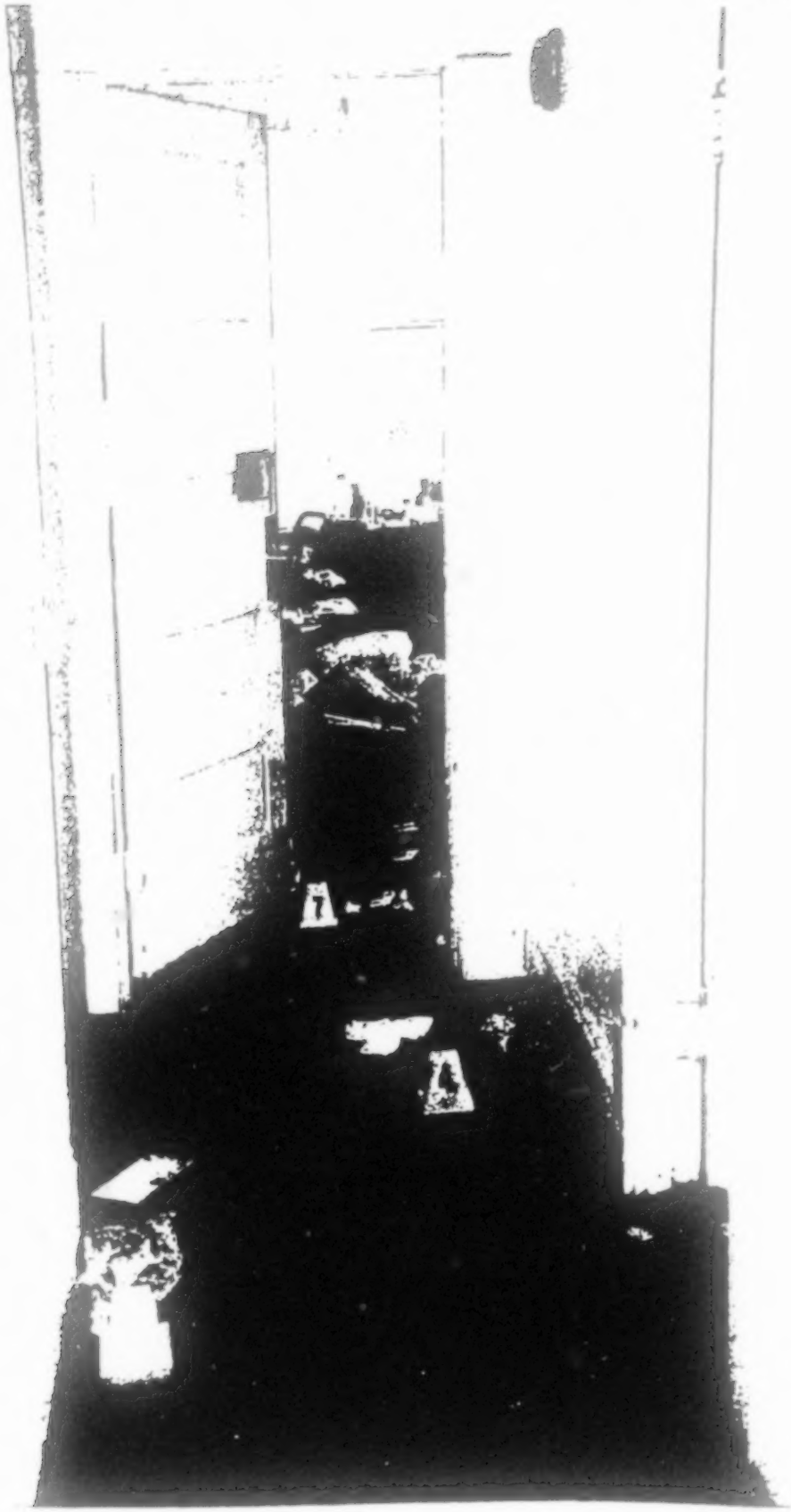


EXHIBIT 128
ZACHOS 10/29

EXHIBIT 129
ZACHOS 10/29

EXHIBIT 140
ZACHOS 10/29

CASE #: 080-830-714
LOCATION: 1941 – 15TH STREET
DATE: 08-07-2008
TIME: 1156
CSO: GANSTER # 1830/ CHACON # 638

- NOT TO SCALE
- MEASUREMENTS ARE APPROXIMATE

EXHIBIT A
Date: November 2, 2010
Witness: Kathrine Holder

Printed for: WS03/A06051 Thu Aug 14 16:38:26 2008

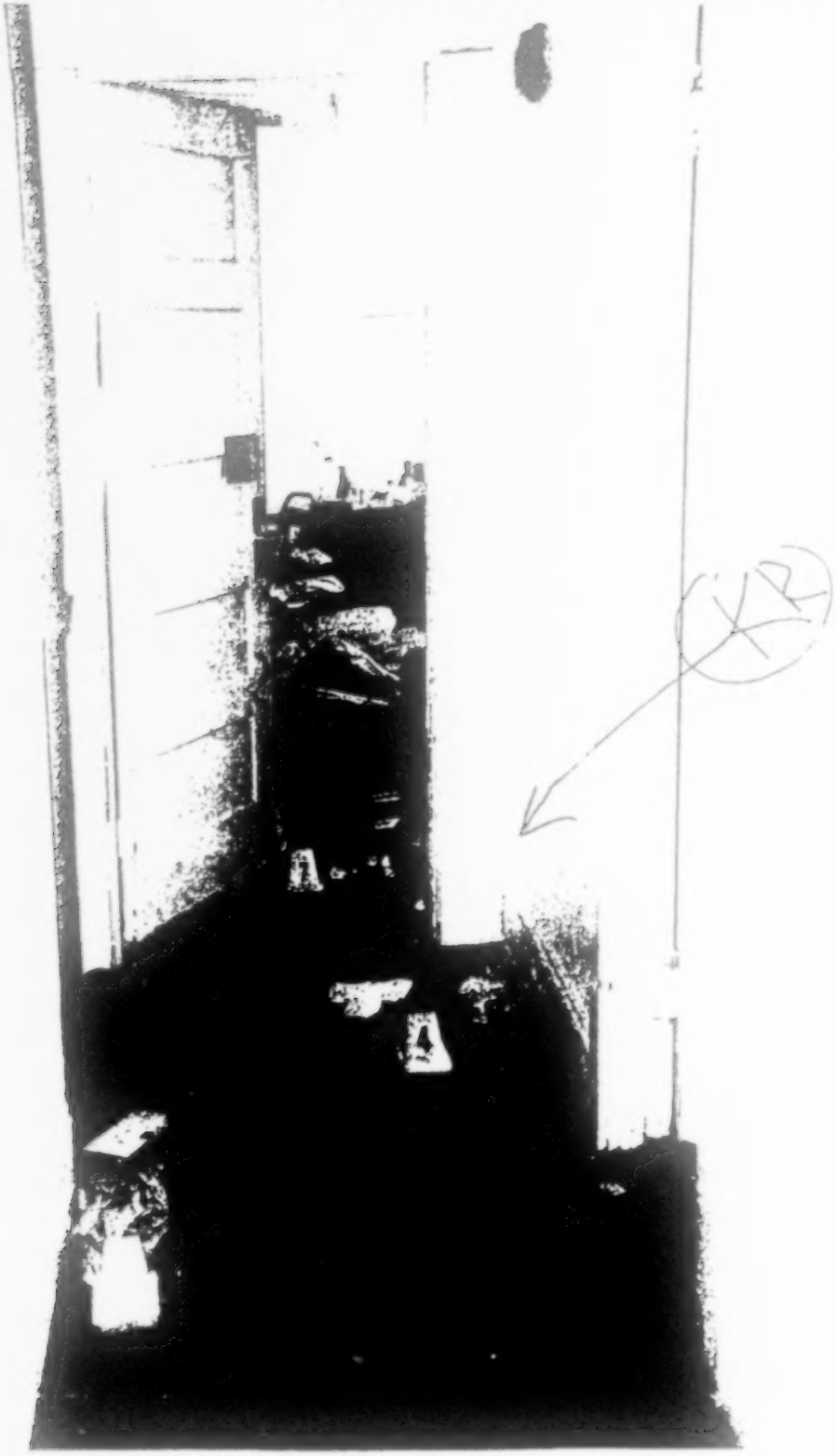
Tiburon/CAD	EVENT HISTORY DETAIL:	S082201521	08-14-08
	SAN FRANCISCO POLICE		16:38

S082201521 A 905 1941 15TH ST, SF (D=3D DOLORES ST & LANDERS ST) D1

11:10:11	CT19	ENTRY	RP:HEDTH HODGE, SOCIAL WKER //CELL PH\PH: [Omitted] TX:SOCIAL WKER JUST WENT INSIDE TO CK ON HIS PATIENT, SUBJ IS KNOWN TO MAKE VIOLENT THREATS, TOLD RP TO GET OUT OR SHE'LL KNIFE HIM (NO WEAPON SEEN)// NAME IS TERESA SHEEHAN/EURASIAN, EARLY 50'S, WEARING STRIPED SHIRT/PANTS
11:10:11	CT19	PRIOR	915 07/25/08 S0968 (1 MORE)
11:11:24	DP05	BRDCAST	082201521 B 905 1941 15TH ST, SF 10-8: 2R03D 3D2A 3D4A 3D41A 3D61K 3D70 3D90A 3D120
11:13:13	DP05	HOLD	
11:25:27	DP05	BRDCAST	082201521 B 905 1941 15TH ST, SF 10-8: 2R03D 3D4A 3D5A 3D24 3D45A 3D61K 3D120 4K101
11:25:34	DP05	HOLD	
11:27:31	DP05	DISP-ENR	3D5A:P
11:27:31	DP05	PERS-ID	3D5A <A07422>HOLDER KATHRINE E/1619
11:28:28	M426	ONSCENE	3D5A
11:37:34	DP05	BACK-ENR	3D5A 3D106:S
11:37:34	DP05	PERS-ID	3D106 <A01409>REYNOLDS KIMBERLY A/0615
11:51:40	DP05	MISC	3D5A, C33 HAS A 222 NEED ADDITIONAL STREET
11:51:56	DP05	BACK-ENR	3D5A 3D90A:P, HAS LESS THAN LETHA
11:51:56	DP05	PERS-ID	3D90A <A03997>SALVADOR RAY B/1300
11:52:14	DP05	BACK-ENR	3D90A 3D6A:P
11:52:14	DP05	PERS-ID	3D6A <A07423>ORTIZ LUIS E/1029
11:52:29	DP05	BACK-ENR	3D5A 3D67:P
11:52:29	DP05	PERS-ID	3D67 <A07629>BAILEY UNA M/0589
11:52:30	DP12	BACK-ENR	3D6A 3D70:P
11:52:30	DP12	PERS-ID	3D70 <A00470>ESCOBAR JAMES/0272
11:52:39	DP12	MISC	3D5A, UNIT TO THE BACK
11:52:45	DP05	MISC	3D5A, SEND 70 TO THE BACK OF THE BLDG
11:53:11	DP12	MISC	3D5A, SHOTS FIRED INSIDE

11:53:14	DP05	MISC	3D5A, SHOTS FIRED
11:53:16	DP10	BACK-ENR	3D5A 4T3D:UN
11:53:16	DP10	PERS-ID	4T3D <A00490>FARMER DOUGLAS N/0489
11:53:18	DP06	RCONTACT	3D67
11:53:23	DP04	BACK-ENR	3D5A 4K4:UN
11:53:23	DP04	PERS-ID	4K4 <A01083>MAYERS JOSEPH S/1538
11:53:50	DP10	MISC	3D5A, FIRE CAD .146
11:53:55	DP05	MISC	3D5A, WOMAN IN HER 60'S 4 SHOT
11:54:05	DP12	MISC	3D5A, CODE 33///410 ON
11:54:23	DP12	BACK-ENR	3D106 5O3:UN
11:54:36	M413	BACK-ENR	3D106 4T96:UN
11:54:36	M413	PERS-ID	4T96 <A00193>BYRNE ROBERT W/0828
11:54:40	DP12	MISC	3D106, SUSP SHOT 4 TIMES /
11:54:44	DP12	BACK-ENR	3D106 3D41A:P
11:54:44	DP12	PERS-ID	3D41A <A04898>FRAZER LISA M/1056
11:54:53	DP12	BACK-ENR	3D106 5T26:UN
11:55:05	DP12	BACK-ENR	3D106 3D201:S
11:55:05	DP12	PERS-ID	3D201 <A02205>PEDRINI CHRISTOPHER J/1204
11:55:25	SU05	MISC	OPS NTFY'D // YOUNG
11:55:50	M305	BACK-ENR	3D5A 3D13A:P
11:55:50	M305	PERS-ID	3D13A <A07862>PEREZ ESTEBAN V/4183 <A06005>JOHNSON KUNTHEA/0073
11:55:50	DP12	MISC	3D106, CODE 33// TILL SCENE IS CLEAR
11:56:33	DP04	CLEAR	4K4
11:56:58	DP05	MISC	3D70, KEEP C33 ON A4 ONLY TO CLEAR THE SCENE . . .

EXHIBIT K
WITNESS E.R. BALINTON
DATE 10/27/10 1 PAGE(S)
BY: BARBARA J. BUTLER, CSR #5604
B.BUTLER CERTIFIED COURT REPORTERS



#	DESCRIPTION	X	Y	NOTES
1	CASING	6'-2"	23'-4"	
2	O.C. CANISTER/SF.P.D.	7'-11"	20'-5"	ISSUED TO OFFICER HOLDER
3	CASING	11'-0"	21'-0"	
4	CASING	9'-1"	18'-6"	
5	CASING	11'-10"	18'-9"	
6	BULLET	11'-7"	17'-11"	
7	KNIFE (6") METAL BLADE (5") BLACK HANDLE	8'-8"	13'-0"	
8	BULLET	2'-0"	11'-7"	
9	LOADED MAGAZINE & CASING	5'-9"	4'-7"	ISSUED TO OFC. ZACHOS# 1049

X AND Y COORDINATES TAKEN FROM BEDROOM # 3.

X = SOUTH WALL @ WINDOW CUT TO NORTH WALL

Y = WEST WALL TO EAST WALL

KNIFE

MAGAZINE

CASINGS

O.C. CANISTER

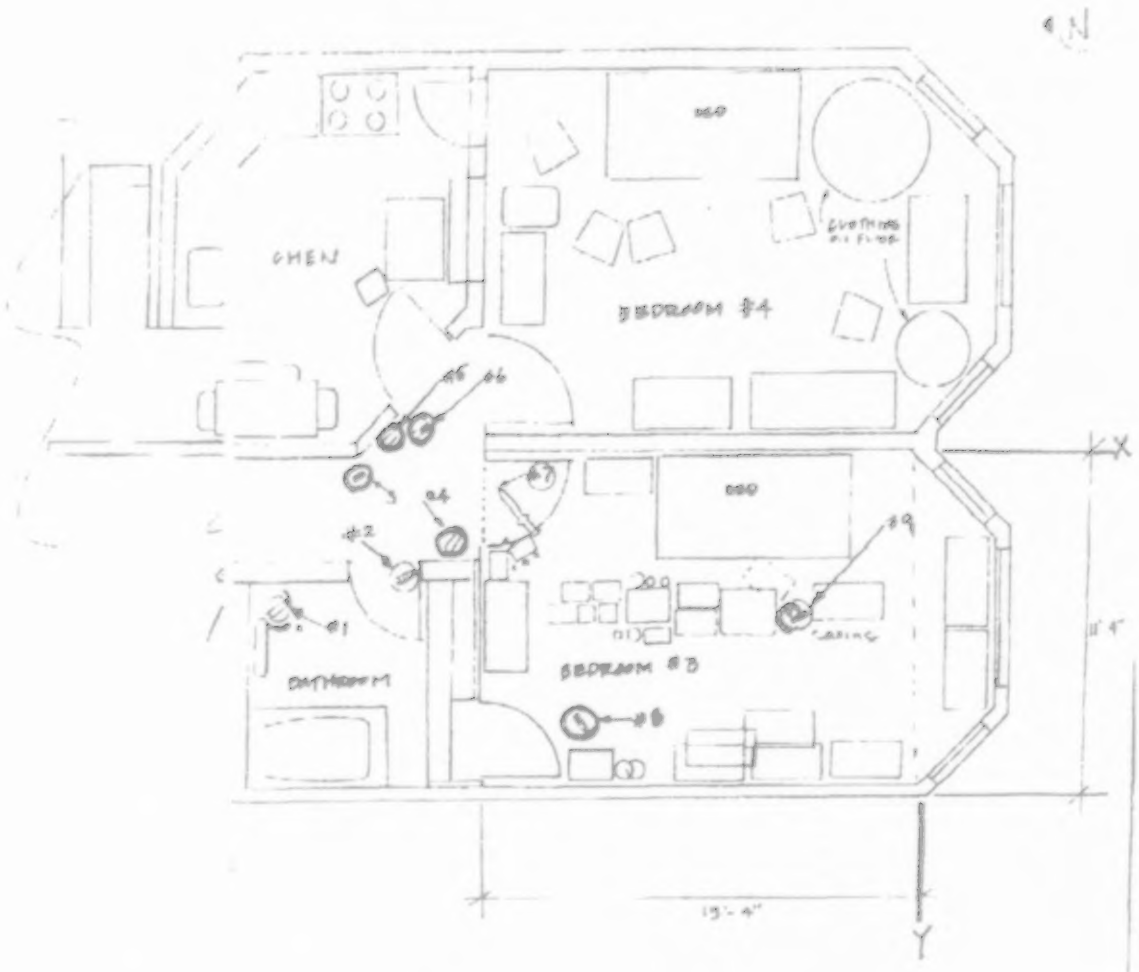
BULLET

— 40 SIG AM 17 797

— 40 SIG AM 24 078 Reynolds

CASE #: 080-830-714

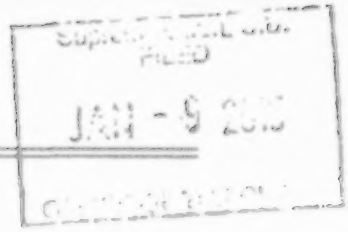
LOCATION: 1941 – 15TH STREET
DATE: 08-07-2008 TIME: 1156
CSO: GANSTER # 1830/CHACON # 638



- NOT TO SCALE
- MEASUREMENTS ARE APPROXIMATE

PETITIONER'S BRIEF

No. 13-1412



In The
Supreme Court of the United States

CITY AND COUNTY OF
SAN FRANCISCO, CALIFORNIA, *et al.*,

Petitioners,

v.

TERESA SHEEHAN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' BRIEF

SAN FRANCISCO CITY
ATTORNEY'S OFFICE
DENNIS J. HERRERA
City Attorney
CHRISTINE VAN AKEN
Chief of Appellate Litigation
BLAKE P. LOEBS
PETER J. KEITH, *Counsel of Record*
Deputy City Attorneys
1390 Market Street, 7th Floor
San Francisco, CA 94102
(415) 554-3908
peter.keith@sfgov.org

Counsel for Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

After respondent Teresa Sheehan threatened to kill a social worker at her group home for the mentally ill, the petitioner San Francisco police officers were called to detain her for psychiatric evaluation. When the officers entered her room, Sheehan attacked them with a knife, forcing them out of the room and slamming her door. The officers re-opened the door, and Sheehan attacked them again with the knife. Pepper spray did not stop Sheehan's advance, and to defend themselves, the officers shot Sheehan. She survived and sued the officers and petitioner City and County of San Francisco, contending that the officers' entry and use of force were unreasonable under the Fourth Amendment and that they failed to accommodate her mental illness by delaying her arrest.

The questions presented are:

1. Whether Title II of the Americans with Disabilities Act requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody.

2. Whether it was clearly established that even where an exception to the warrant requirement applied, an entry into a residence could be unreasonable under the Fourth Amendment by reason of the anticipated resistance of an armed and violent suspect within.

PARTIES TO THE PROCEEDING

Petitioners are the City and County of San Francisco, a California municipal corporation, and two individual San Francisco police officers, Sergeant Kimberly Reynolds and Officer Kathrine Holder. Petitioners were defendants-appellees below. Police Chief Heather Fong was a defendant-appellee below but is not a petitioner here because the judgment in her favor was affirmed by the court of appeals.

Respondent is Teresa Sheehan, an individual, who was plaintiff-appellant below.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Constitutional, statutory, and regulatory provisions involved 1

Statement 1

I. Factual background 1

II. Proceedings below 11

Summary of argument 17

Argument 19

I. Sheehan was not entitled to receive accommodations in her arrest under Title II of the Americans with Disabilities Act 19

A. Because Sheehan's armed violence posed a direct threat in the reasonable judgment of the officers, she was not entitled to accommodations in her arrest 20

B. Modifications to Sheehan's arrest would not have eliminated the significant risk she posed, and were not reasonable 34

II. The officers have qualified immunity, because it was not clearly established that even where an exception to the warrant requirement applied, an entry into a residence could be unreasonable under the Fourth Amendment by reason of the anticipated resistance of an armed and violent suspect within 41

TABLE OF CONTENTS – Continued

Page

A. Federal cases did not clearly establish the need for officers to desist from entering when they can anticipate resistance 43

B. California law authorized officers to persist in making an arrest in the face of resistance 54

C. A reasonable officer could have concluded that the threat posed by Sheehan justified re-opening her door 56

Conclusion 59

APPENDIX

Relevant constitutional, statutory, and regulatory provisions 1a

TABLE OF AUTHORITIES

Page

CASES:

Alexander v. City and County of San Francisco, 29 F.3d 1355 (9th Cir. 1994) 47, 48

Ashcroft v. Al-Kidd, 131 S. Ct. 2074 (2011) 42, 45, 50

Barber ex rel. Barber v. Colorado Dept. of Revenue, 562 F.3d 1222 (10th Cir. 2009).....39

Bates v. Chesterfield County, 216 F.3d 367 (4th Cir. 2000) 31, 33, 51

Billington v. Smith, 292 F.3d 1177 (9th Cir. 2002) 48

Bircoll v. Miami-Dade County, 480 F.3d 1072 (11th Cir. 2007).....37

Blanford v. Sacramento County, 406 F.3d 1110 (9th Cir. 2005) 49

Bodine v. Warwick, 72 F.3d 393 (3d Cir. 1995).....53

Boyd v. Benton County, 374 F.3d 773 (9th Cir. 2004) 46

Bragdon v. Abbott, 524 U.S. 624 (1998).....*passim*

Brigham City v. Stuart, 547 U.S. 398 (2006).....43, 45, 46

Brosseau v. Haugen, 543 U.S. 194 (2004).....49, 58

Buchanan v. Maine, 469 F.3d 158 (1st Cir. 2006) 51

Butz v. Economou, 438 U.S. 478 (1978).....56

Calef v. Gillette Co., 322 F.3d 75 (1st Cir. 2003).....32

TABLE OF AUTHORITIES – Continued

Page

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 21

Connelly v. American Bonding & Trust Co., 69 S.W. 959 (Ky. 1902) 55

De Boise v. Taser Intern., Inc., 760 F.3d 892 (8th Cir. 2014) 31

Deorle v. Rutherford, 272 F.3d 1272 (9th Cir. 2001) 47, 49

Dickerson v. McClellan, 101 F.3d 1151 (6th Cir. 1996) 53

Doe v. Woodford County Bd. of Educ., 213 F.3d 921 (6th Cir. 2000) 24, 40

Drummond v. City of Anaheim, 343 F.3d 1052 (9th Cir. 2003) 49

E.E.O.C. v. Amego, Inc., 110 F.3d 135 (1st Cir. 1997) 27

Espinosa v. City and County of San Francisco, 598 F.3d 528 (9th Cir. 2010) 52

Estate of Bennett v. Wainwright, 548 F.3d 155 (1st Cir. 2008) 51

Fields v. Dailey, 587 N.E.2d 400 (Ohio Ct. App. 1990) 55

Fisher v. City of San Jose, 558 F.3d 1069 (9th Cir. 2009) 46, 47

Franklin v. Foxworth, 31 F.3d 873 (9th Cir. 1994) 46

TABLE OF AUTHORITIES – Continued

Page

Gohier v. Enright, 186 F.3d 1216 (10th Cir. 1999) 31

Graham v. Connor, 490 U.S. 386 (1989) 25, 26, 47, 55

Gregory v. County of Maui, 523 F.3d 1103 (9th Cir. 2008) 49

Groh v. Ramirez, 540 U.S. 551 (2004) 56

Hainze v. Richards, 207 F.3d 795 (5th Cir. 2000) 12, 14, 26, 30, 34

Halpern v. Wake Forest Univ. Health Sciences, 669 F.3d 454 (4th Cir. 2012) 27

Harris v. Serpas, 745 F.3d 767 (5th Cir. 2014) 51, 52

Hector v. Watt, 235 F.3d 154 (3d Cir. 2001) 53

Hernandez v. City of Pomona, 46 Cal. 4th 501 (2009) 55

Hogan v. Cunningham, 722 F.3d 725 (5th Cir. 2013) 53

Hudson v. Michigan, 547 U.S. 586 (2006) 44

Hunter v. Bryant, 502 U.S. 224 (1991) 42

Hutton v. Elf Atochem N. Am., Inc., 273 F.3d 884 (9th Cir. 2001) 29

Kentucky v. King, 131 S. Ct. 1849 (2011) 45

Klinkel v. Saddler, 233 N.W. 538 (Iowa 1930) 55

Krueger v. State, 177 N.W. 917 (Wis. 1920) 55

Livermore v. Lubelan, 476 F.3d 397 (6th Cir. 2007) 53

TABLE OF AUTHORITIES – Continued

Page

Lockett v. Catalina Channel Express, Inc., 496 F.3d 1061 (9th Cir. 2007) 24

Long v. City and County of Honolulu, 511 F.3d 901 (9th Cir. 2007) 49

Maryland v. Buie, 494 U.S. 325 (1990).....59

McElwee v. County of Orange, 700 F.3d 635 (2d Cir. 2012).....31, 35

Menuel v. City of Atlanta, 25 F.3d 990 (11th Cir. 1994).....51, 52

Mercer v. Commonwealth, 142 S.E. 369 (Va. 1928).....55

Michigan v. Tyler, 436 U.S. 499 (1978).....*passim*

Morgan v. State, 262 S.W.2d 713 (Tex. Crim. App. 1953).....55

Myrick v. Cooley, 371 S.E.2d 492 (N.C. 1988).....55

Oconomowoc Residential Programs, Inc. v. City of Milwaukee, 300 F.3d 775 (7th Cir. 2002).....37

Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581 (1999).....21, 27

Palmer v. Circuit Court of Cook County, Ill., 117 F.3d 351 (7th Cir. 1997).....32

Pearson v. Callahan, 555 U.S. 223 (2009).....42, 56

People v. Doss, 276 N.W.2d 9 (Mich. 1979).....55

People v. Toler, 9 P.3d 341 (Colo. 2000).....55

Peters v. City of Mauston, 311 F.3d 835 (7th Cir. 2002).....27

TABLE OF AUTHORITIES – Continued

Page

PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001) 40

Plakas v. Drinski, 19 F.3d 1143 (7th Cir. 1994) 52

Plumhoff v. Rickard, 134 S. Ct. 2012 (2014) 50, 57

Reynolds v. County of San Diego, 84 F.3d 1162 (9th Cir. 1996) 49

Rice v. ReliaStar Life Ins. Co., 770 F.3d 1122 (5th Cir. 2014) 51

Rockwell v. Brown, 664 F.3d 985 (5th Cir. 2011) 51

Ryburn v. Huff, 132 S. Ct. 987 (2012) 57, 58

Salim v. Proulx, 93 F.3d 86 (2d Cir. 1996) 52

Sanders v. City of Minneapolis, 474 F.3d 523 (8th Cir. 2007) 51

Saucier v. Katz, 533 U.S. 194 (2001) 47, 56, 58

School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987) 21, 26, 27, 35

Schulz v. Long, 44 F.3d 643 (8th Cir. 1995) 52

Scott v. Harris, 550 U.S. 372 (2007) 44, 57

Seremeth v. Bd. of County Commissioners, Frederick County, 673 F.3d 333 (4th Cir. 2012) 25, 27, 37

Sheppard v. State, 594 S.E.2d 462 (S.C. 2004) 55

Stanton v. Sims, 134 S. Ct. 3 (2013) 42, 46, 48, 54

State v. Acosta, 242 P. 316 (Nev. 1926) 55

State v. Castle, 616 P.2d 510 (Or. 1980) 55

State v. Prlja, 189 P. 64 (Mont. 1920) 55

TABLE OF AUTHORITIES – Continued

Page

State v. Reppert, 52 S.E.2d 820 (W. Va. 1949) 55

State v. Vargas, 74 P.2d 62 (N.M. 1937).....55

State v. Washington, 737 N.W.2d 382 (N.D. 2007).....55

Theriault v. Flynn, 162 F.3d 46 (1st Cir. 1998) 28

Tsombanidis v. W. Haven Fire Dep't, 352 F.3d 565 (2d Cir. 2003).....39

Tucker v. Tennessee, 539 F.3d 526 (6th Cir. 2008).....31, 37

Union Indem. Co. v. Webster, 118 So. 794 (Ala. 1928).....54

U.S. Airways v. Barnett, 535 U.S. 391 (2002) 37

United States v. Bailey, 691 F.2d 1009 (11th Cir. 1982).....54

United States v. Banks, 540 U.S. 31 (2003).....45

United States v. Echegoyen, 799 F.2d 1271 (9th Cir. 1986).....46

United States v. Kaplan, 895 F.2d 618 (9th Cir. 1990).....46

United States v. King, 724 F.2d 253 (1st Cir. 1984).....54

United States v. Pryor, 32 F.3d 1192 (7th Cir. 1994).....53

United States v. Santana, 427 U.S. 38 (1976).....44

United States v. Sledge, 460 F.3d 963 (8th Cir. 2006).....53

TABLE OF AUTHORITIES – Continued

Page

United States v. Snipe, 515 F.3d 947 (9th Cir. 2008) 46

United States v. Sprinkle, 106 F.3d 613 (4th Cir. 1997) 53

United States v. Waupekenay, 973 F.2d 1533 (10th Cir. 1992) 53

Waller v. City of Danville, 556 F.3d 171 (4th Cir. 2009) 25, 27, 36

Warden, Md. Penitentiary v. Hayden, 387 U.S. 294 (1967) 43, 44, 58

Waterman v. Batton, 393 F.3d 471 (4th Cir. 2005) 52

Wilson v. Layne, 526 U.S. 603 (1999) 50, 59

CONSTITUTION AND STATUTES:

U.S. Const. Amend. IV ..... *passim*

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 12

Rehabilitation Act of 1973, 29 U.S.C. § 794 ..... 21, 39

42 U.S.C. § 1983 ..... 12, 14

Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.*:

tit. I, 42 U.S.C. §§ 12111 *et seq.* ..... *passim*

42 U.S.C. § 12113(b) 31

tit. II, 42 U.S.C. §§ 12131 *et seq.* ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 12131(2) 21
42 U.S.C. § 12132 ..... 17, 20, 34
42 U.S.C. § 12134 21
tit. III, 42 U.S.C. §§ 12181 *et seq.* 23, 32, 40
42 U.S.C. § 12182(b)(3) 32
42 U.S.C. § 12206(c)(1) 21
42 U.S.C. § 12210(a) 33
Ala. Code § 22-52-91 39
Alaska Stat. Ann. § 47.30.705 38
Ariz. Rev. Stat. Ann. § 13-410 55
Ariz. Rev. Stat. Ann. § 36-525 39
Ark. Code Ann. § 20-47-210 38
Cal. Penal Code § 245(a) 11
Cal. Penal Code § 245(c) 11
Cal. Penal Code § 422 11
Cal. Penal Code § 835a 54
Cal. Welf. and Inst. Code § 5150 ..... 3, 38
Cal. Welf. and Inst. Code § 5152 3
Colo. Rev. Stat. § 27-65-105 38
Conn. Gen. Stat. Ann. § 17a-503 38
Conn. Gen. Stat. Ann. § 53a-22 55
Del. Code Ann. tit. 11, § 464 54
Del. Code Ann. tit. 16, § 5004 38

TABLE OF AUTHORITIES – Continued

Page

Fla. Stat. Ann. § 394.463 38
Fla. Stat. Ann. § 776.05 54
Ga. Code Ann. § 37-3-41 39
Haw. Rev. Stat. § 334-59 39
Haw. Rev. Stat. § 803-7 54
Idaho Code Ann. § 66-326 38
Idaho Code Ann. § 19-610 55
405 Ill. Comp. Stat. Ann. 5/3-606 38
720 Ill. Comp. Stat. Ann. 5/7-5 54
Ind. Code Ann. § 12-26-4-1 38
Iowa Code Ann. § 229.22 38
Kan. Stat. Ann. § 21-5227 54
Kan. Stat. Ann. § 59-2953 38
Ky. Rev. Stat. Ann. § 202a.041 38
La. Code Crim. Proc. Ann. art. 220 54
La. Rev. Stat. Ann. § 28:53 38
Me. Rev. Stat. Ann. tit. 17-A, § 107 55
Me. Rev. Stat. Ann. tit. 34, § 3862 39
Mass. Gen. Laws Ann. ch. 123 § 12 38
Md. Code Ann., Health-Gen. § 10-624 38
Mich. Comp. Laws Ann. § 330.1427 38
Minn. Stat. Ann. § 253b.05 38
Minn. Stat. Ann. § 609.06 55

TABLE OF AUTHORITIES – Continued

Page

Miss. Code Ann. § 41-21-67 39
Miss. Code Ann. § 97-3-15 55
Mo. Ann. Stat. § 563.046 54
Mo. Ann. Stat. § 632.300 39
Mont. Code Ann. § 53-21-129 38
Neb. Rev. Stat. Ann. § 28-1409(4)(b)(ii) 54
Neb. Rev. Stat. Ann. § 71-919 38
Nev. Rev. Stat. Ann. § 433a.160 38
N.H. Rev. Stat. Ann. § 135-C:29 39
N.H. Rev. Stat. Ann. § 627:5 55
N.J. Stat. Ann. § 2C:3-4(b)(2)(b)(ii) 54
N.J. Stat. Ann. § 30:4-27.6 38
N.M. Stat. Ann. § 43-1-10 38
N.Y. Mental Hyg. Law § 9.41 38
N.C. Gen. Stat. Ann. § 122c-262 38
N.D. Cent. Code Ann. § 25-03.1-25 38
Ohio Rev. Code Ann. § 5122.10 38
Okla. Stat. Ann. tit. 43a, § 5-207 38
Okla. Stat. Ann. tit. 22, § 193 54
Or. Rev. Stat. Ann. § 426.228 38
18 Pa. Cons. Stat. Ann. § 508 54
50 Pa. Cons. Stat. Ann. § 4405 38
R.I. Gen. Laws Ann. § 40.1-5-7 39

TABLE OF AUTHORITIES – Continued

Page

S.C. Code Ann. § 44-17-410 39
S.C. Code Ann. § 44-17-430 39
S.C. Code Ann. § 44-17-440 39
S.D. Codified Laws § 27a-10-3 38
Tenn. Code Ann. § 33-6-402.....38
Tenn. Code Ann. § 40-7-108.....55
Tex. Health & Safety Code Ann. § 573.001.....38
Utah Code Ann. § 62a-15-629 38
Utah Code Ann. § 77-7-7 55
Vt. Stat. Ann. tit. 13, § 2305.....55
Vt. Stat. Ann. tit. 18, § 7505.....39
Va. Code Ann. § 37.1-67.01.....38
Wash. Rev. Code Ann. § 10.31.050 54
Wash. Rev. Code Ann. § 71.05.153 38
W. Va. Code Ann. § 9-6-5 38
Wis. Stat. Ann. § 51.20 38
Wyo. Stat. Ann. § 25-10-109 38

REGULATIONS AND ADMINISTRATIVE MATERIALS:

28 C.F.R.:

Part 35, §§ 35.101 *et seq.* 21
§ 35.104 .....22, 23, 32, 35
§ 35.130(b)(7).....21, 34, 37, 40

TABLE OF AUTHORITIES – Continued

Page

§ 35.130(h) 22

§ 35.139 ..... *passim*

App. B 23, 32

Part 36, §§ 36.101 *et seq.* 32

§ 36.208 ..... 24, 32, 36

App. C 32

29 C.F.R. § 1630.2 ..... 31, 40

49 C.F.R. § 37.5(h) 32

United States Department of Justice, *Americans with Disabilities Act Title II Technical Assistance Manual* (1993) 22

United States Department of Justice, *Commonly Asked Questions About the Americans with Disabilities Act and Law Enforcement* (Rev. Apr. 4, 2006) 31

United States Department of Justice, *Communicating with People Who Are Deaf or Hard of Hearing, ADA Guide for Law Enforcement Officers* (Jan. 2006) 37

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS:

H.R. Rep. No. 485(III), 101st Cong., 2d Sess. (1990) 26

John Monahan & Henry J. Steadman, *Extending Violence Reduction Principles to Justice-Involved Persons with Mental Illness*, in Dvoskin *et al.* (eds.), *Applying Social Science to Reduce Violent Offending* 245 (2012) 33

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1, is reported at 743 F.3d 1211. The order of the district court, Pet. App. 55, is unreported but available at 2011 WL 1748419.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 2014. The petition for a writ of certiorari was filed on May 22, 2014. The petition was granted on November 25, 2014. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The pertinent constitutional, statutory, and regulatory provisions are reproduced in the appendix to this brief. App., *infra*, 1a.

STATEMENT

I. Factual Background

Respondent Teresa Sheehan resided in a San Francisco group home for individuals with mental illness and substance abuse problems. The home was operated by Conard House, a nonprofit cooperative

apartment program that provides housing and support services in a community setting. J.A. 19-22.

On August 7, 2008, a Conard House program supervisor, Heath Hodge, attempted to conduct a welfare check on Sheehan. Hodge was concerned because Sheehan was diagnosed with schizo-affective disorder, but she had cut off contact with her psychiatrist and had been off her medication for months. Other residents reported that she was behaving erratically, had not changed her clothes for weeks, and was not coming to house meetings. Sheehan's case manager had reported that Sheehan was hostile toward her. J.A. 22-24. Hodge also knew that Sheehan had previously made violent threats and behaved aggressively. J.A. 84-85.

Hodge went to Sheehan's bedroom door and knocked several times, but there was no answer. Per Conard House protocol, Hodge used his key to unlock and open her door. Sheehan was lying on her bed. Hodge repeatedly tried to speak with Sheehan. At first she would not respond – but then she suddenly jumped out of bed and yelled at Hodge to get out of her room. She threatened, "I have a knife, and I'll kill you if I have to!" J.A. 398. Hodge did not wait to see if Sheehan would act on her threat, or to see a knife. He quickly backed out of the room, and she slammed the door behind him. J.A. 91-96.

Hodge "took what [Sheehan] said seriously." J.A. 97. He "knew at that point it wasn't going to go over well and that I needed to do some sort of

intervention." J.A. 96. Hodge asked one of Sheehan's housemates to leave the flat, and checked and saw that two other housemates were not in their bedrooms. Hodge then left the flat and went to his car to get a "5150 form" – the paperwork necessary for Sheehan to be taken to a secure psychiatric facility. *Id.*

Hodge was acting under section 5150 of the California Welfare and Institutions Code. That provision authorizes a 72-hour detention of an individual who, as a result of a mental health disorder, is a danger to others, a danger to oneself, or "gravely disabled" – unable to care for her basic needs. Cal. Welf. & Inst. Code § 5150 (West Supp. 2014). A 5150 detention may be made by law enforcement officers or by other designated professionals like Hodge. *Id.* Once the detained individual is in custody and at a secure facility, medical personnel can diagnose and treat the patient and decide whether she needs to remain hospitalized. *Id.* § 5152; J.A. 88-89.

Outside the group home, Hodge completed a 5150 form for Sheehan. In addition to checking off boxes indicating that she was a "threat to others" and "gravely disabled," Hodge wrote down information about Sheehan's psychiatric history and her threat against him. J.A. 86-88, 397-398 (form). After filling out the 5150 form, Hodge called the San Francisco Police Department. He asked the dispatcher for police assistance in transporting Sheehan to a secure facility. Hodge mentioned Sheehan's history of aggressive behavior and making violent threats; he gave this

additional information to "make sure that the police did come and that they came in a timely manner." J.A. 84-85. After Hodge called the police, he went to the corner store to get a bottle of water. J.A. 98.

The dispatcher broadcast Hodge's request for police assistance, and advised officers that Sheehan was "known to make violent threats." J.A. 407. San Francisco Police Officer Kathrine Holder responded to the call. J.A. 161. Holder met Hodge outside the residence, as he was returning from the corner store. J.A. 26. Hodge told her about Sheehan's history and behavior, and showed her his 5150 form. J.A. 168-171. Holder was not familiar with the procedure for civilians authorizing a section 5150 detention, so she called Sergeant Kimberly Reynolds. J.A. 172-173. Reynolds came to the scene, where Hodge told her about Sheehan's history and went over the 5150 form. J.A. 33-34, 100-102. Reynolds called her lieutenant, who authorized the officers to assist Hodge. J.A. 219-220. Then, Reynolds and Hodge discussed whether the psychiatric emergency services unit at San Francisco General Hospital would be able to admit Sheehan. Hodge telephoned the triage nurse there, who agreed to accept Sheehan. Hodge, Tr. at 13, Dist. Ct. Dkt. 48-9.

The officers then went in to the flat with Hodge to confirm his assessment of Sheehan. J.A. 34, 210-211. Reynolds thought Hodge's presence would be helpful in communicating with Sheehan, if it was safe for him to do so. J.A. 34-35, 216. They would go to her

room together, knock on the door, and let her know the police were there. J.A. 35, 102.

Hodge directed the officers to Sheehan's room, which was the last door at the end of a long hallway. To the left of her door, the hallway ended in an alcove, so that the hallway was laid out in the shape of a "7." J.A. 35-36, 403, 406. The doors along the hallway were closed. J.A. 215.

When the officers reached Sheehan's door, their weapons were holstered. J.A. 38-39, 227. Reynolds knew that Sheehan was mentally ill and chose her approach with that in mind. J.A. 49. She knocked and spoke through the closed door, saying "Teresa, San Francisco Police Department, we're here to help you, we're just going to talk to you," and "we're here to help you, we're concerned about you. Heath here says that, you know, you're not doing okay." J.A. 49, 58-59, 103, 177, 217. Sheehan did not answer, and Reynolds used Hodge's key to open her door. J.A. 213, 217.

Sheehan was lying on her bed. Next to her bed, there was a plate with several knives on it. Immediately, Sheehan got up and grabbed a knife. J.A. 36, 179-180, 221-222. The knife was 11 inches long with a 6-inch fixed blade. J.A. 39, 106, 150, 399, 404-405. Sheehan came at the officers with her knife, yelling that she was going to kill them and that they had to leave because they did not have a warrant. J.A. 36-37, 59-60, 105-107, 177-182, 222-225, 283-284. Sheehan told the officers that she already made a

police report, and the officers responded that they were the police and they were there to help her. J.A. 59-60. Sheehan screamed that she didn't need their help. J.A. 223. The officers asked Sheehan to "please drop the knife." J.A. 179. Sheehan kept screaming. J.A. 223. She came toward the doorway with her knife. Reynolds initially used her foot to brace open Sheehan's door, but she backed out when "it became clear that I had to move my foot, or I was going to get stabbed. And once I pulled my foot out of the threshold, she was able to close the door on me." J.A. 226; J.A. 37.

After Sheehan forced the door closed, the officers knew they were dealing with someone who was armed and violent. They started "doing multiple things all at once," and "everything happened and unfolded very quickly." J.A. 38-40, 53, 232.

Reynolds attempted to keep talking to Sheehan, "telling her we're the police department, we're here to help her, we need to talk to her, put the knife down." J.A. 39, 61. Reynolds explained why she kept trying to speak with Sheehan even after her violent outburst: "I had hoped that I could verbally communicate with her. Once the door was closed, that took it to a completely different level because she had just tried to stab us. And at that point it was clear that she probably wasn't going to comply with any verbal commands. But you always hope that as an officer that you can talk your way out of a situation and be respectful and compassionate. So I didn't throw those tools out the door. " J.A. 263.

Meanwhile, Holder radioed for backup to cover the rear of the building, but the dispatcher broadcast the wrong location. J.A. 61, 185. Holder worked to correct the dispatching error, but even up to the end of their encounter with Sheehan, Holder and Reynolds had no confirmation that backup officers were covering the back of the building. J.A. 61, 197-198, 218-219, 232.

Covering the back of the building was important because the officers were concerned Sheehan could escape and hurt someone. J.A. 175, 197, 227, 229, 233. Hodge had told the officers that the only other way out of Sheehan's room was her back window. J.A. 116. The officers knew Sheehan's flat was on the second floor, but that did not dispel their concerns about escape because "[i]n many of the buildings in San Francisco, there are fire escapes," and they didn't "know if there's a hill graded up so it wouldn't be a full story" up from the backyard. J.A. 199, 218, 234.

Hodge did not give the officers any more information about the back window. Contrary to the suggestion of the court of appeals, Pet. App. 9 & 25 n.8, Hodge never testified that he told the officers that the back window was inaccessible or could be reached only with a ladder. J.A. 116-117. In fact, Hodge testified that during the seconds when this was happening, the officers did not ask for certain details about the window, including whether there actually was a fire escape. *Id.* If they had, Hodge's answer would have heightened their concern, not eliminated it; like the officers, Hodge believed "there's

probably a fire escape, but I don't know for sure." J.A. 117.

Escape was not the only risk that concerned the officers. Reynolds explained that because Sheehan had "displayed obvious signs of violence and wanting to kill Officer Holder and I, officer safety [was] an important factor." J.A. 229; J.A. 38. Tactically, the officers were at a disadvantage because with the door closed they could not see what Sheehan was doing. J.A. 198, 233. "[A]s soon as that door was closed, the threat became more scary for us and [there was] more uncertainty about what we were dealing with." J.A. 227. Sheehan could be gathering more weapons to use against the officers: There were the knives they saw near Sheehan's bed, and other weapons could have been hidden in her cluttered room. J.A. 198, 227-228.

The officers were also concerned that they did not know whether Sheehan was the only person present in her room. When the door was briefly open, they were focused on Sheehan and her knife, and Reynolds "wasn't able to canvass the entire room." J.A. 38, 51, 228. Also, Hodge had left the group home for a time after he had sent other residents out of the building, and Reynolds did not feel the officers could rely fully on his report that no one else was present. J.A. 47, 234. As Holder explained, "[w]e have to assume that there are others that might be in harm's way until we know for sure that they are not." J.A. 183.

Given these risks, Reynolds decided she needed to get the door open and take Sheehan into custody

right away. She explained why: "I was attempting to see more of what Ms. Sheehan was doing. Because the uncertainty of not knowing what she was doing posed a tremendous fear for me and my officer. And then the possibility of the escape is also extremely frightful because had she been able to injure somebody else, then it would have been our responsibility." J.A. 233; *see* J.A. 174-175, 198-199 (Holder's similar view). Reynolds knew that Sheehan was mentally ill. But, as she explained, "[a]t this point in my mind, the disability, the mental illness, became a secondary issue. And what I was faced with was a violent woman who had already threatened to kill her social worker. Said she would do it with a knife. And now I've witnessed her attempting to do that to two uniformed police officers and have the ability to do that by using the weapon." J.A. 235; J.A. 51.

So Reynolds decided "to open the door, pepper spray her, and take her into custody." J.A. 51. Reynolds told Holder, "if the door opens I want you to spray her and douse her with pepper spray." J.A. 40. Holder took out her pepper spray, and the officers also drew their firearms as a backup measure. J.A. 40, 51, 61. Reynolds "was continuing to talk to Miss Sheehan, telling her that we wanted to help her, we were not going to hurt her." J.A. 40. Reynolds kicked the door once or twice, without success. J.A. 52. Holder suggested switching positions, because she was a little bigger. J.A. 40, 61. Holder handed Reynolds her pepper spray. She twisted the knob and shouldered the door, and met resistance from the

other side. J.A. 53, 62-63. At this point, Reynolds heard sirens, looked back at Hodge, and told him to go downstairs to open the door for backup officers. J.A. 41. When Reynolds turned back around, Holder had gotten the door open. J.A. 52, 55, 64.

When the door opened, Sheehan went at the officers with her knife, yelling that she was going to kill them. J.A. 42-43, 65. Reynolds discharged a stream of pepper spray into Sheehan's face. J.A. 42-43. The pepper spray had no apparent effect. J.A. 43, 65. Sheehan crossed the threshold of her room and turned toward Holder. Holder was in the alcove next to Sheehan's room, cornered. J.A. 43-44, 66. With her back literally against the wall, Holder fired twice at Sheehan. J.A. 66. Sheehan was three feet from Holder – so close that Holder had to fire from the hip so Sheehan would not slash her arm. J.A. 75-76. After Holder shot Sheehan twice, Sheehan did not drop her knife or fall to the floor. J.A. 66. Instead, she turned and stepped toward Reynolds with her knife. J.A. 44, 67, 77. Reynolds fired three times at Sheehan. J.A. 44. Sheehan stabbed toward Holder's leg as she went down to the ground, and Reynolds' last shot struck Sheehan when she was on the ground. J.A. 67-68, 80-81. Even on the ground, Sheehan continued to flail her knife at Holder. J.A. 138, 254. Holder remained cornered in the alcove, until a backup officer ran down the hall and finally kicked the knife out of Sheehan's hand. J.A. 81, 144, 257. Sheehan survived.

Sheehan does not materially dispute what happened during this encounter. She testified that the pepper spray blinded her, but she does not dispute that after she was sprayed, she continued out her door into the hallway with her knife upraised, that she refused to drop her knife, or that it was ultimately kicked out of her hand. J.A. 278-290.[1]

The District Attorney charged Sheehan criminally. Following a contested preliminary hearing, the state court held probable cause existed to prosecute Sheehan for several violent felonies: threats against Hodge (Cal. Penal Code § 422), assault with a deadly weapon (*id.* § 245(a)), and assault on a peace officer with a deadly weapon (*id.* § 245(c)). A trial was held, and the jury hung on the assault charges and acquitted Sheehan for her threats against Hodge. The District Attorney dismissed the charges rather than re-try the case. Superior Court of California Minutes, Dist. Ct. Dkt. 48-8.

II. Proceedings Below

A. Sheehan filed suit in the United States District Court for the Northern District of California

---

[1] Sheehan recalled the opening of the door somewhat differently from the other witnesses. She recalls her door opening only once, and she testified that she opened her door rather than that Officer Holder pushed it open. J.A. 271-277. Throughout this case, however, Sheehan has accepted the other witnesses' testimony on these issues as more favorable to her than her own testimony.

(C. Breyer, J.), invoking jurisdiction under 28 U.S.C. § 1331 and naming as defendants the two petitioner officers, petitioner City and County of San Francisco, and Police Chief Heather Fong. Sheehan alleged violations of the Fourth Amendment under 42 U.S.C. § 1983, violations of the "reasonable accommodation" requirement of Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131 *et seq.*, and state law torts. Pet. App. 15.

After discovery, petitioners and Chief Fong moved for summary judgment on all of Sheehan's claims. Sheehan conceded that probable cause existed to arrest her after she assaulted the officers with a knife. Sheehan's MSJ Brief at 17-18, Dist. Ct. Dkt. 42. But she contended the officers violated the Fourth Amendment and Title II of the ADA by entering her room and then using deadly force. Sheehan submitted a declaration regarding police tactics from a former deputy police chief, Lou Reiter. J.A. 301-327. Reiter opined that after Sheehan forced the officers out of her room, the officers should have backed up, formed a perimeter to confine Sheehan in her residence and waited for backup, and that "the officers should have respected Sheehan's comfort zone, engaged in non-threatening communications and used the passage of time to defuse the situation rather than precipitating a deadly confrontation." Pet. App. 45.

The district court granted the motion for summary judgment. Pet. App. 55-82. As to Sheehan's ADA claim, the district court relied on the Fifth Circuit's decision in *Hainze v. Richards*, 207 F.3d 795 (5th

Cir. 2000), to hold that "it would be unreasonable to ask officers, in such a situation, to first determine whether their actions would comply with the ADA before protecting themselves and others." Pet. App. 79-80. The district court also held that none of the officers' conduct violated the Fourth Amendment, thus finding no need to reach the "clearly established" prong of qualified immunity analysis. Pet. App. 65. The district court held the officers' initial entry into Sheehan's room satisfied the emergency aid exception to the warrant requirement. Pet. App. 69-70. As to the officers' decision to re-open the door, the district court held that lawful for three separate reasons: (1) the same emergency still existed, (2) the officers were simply continuing a valid search and needed no additional justification under the "continuous search" doctrine of *Michigan v. Tyler*, 436 U.S. 499, 511 (1978), and (3) the officers had another justification anyway – to arrest Sheehan for attacking them with a knife. Pet. App. 70-71. The district court also noted that the officers "had no way of knowing whether she might escape through a back window or fire escape, whether she might hurt herself, or whether there was anyone else in her room whom she might hurt." Pet. App. 71. Finally, the district court held that the officers' deadly force was a reasonable response to Sheehan's second knife attack. Pet. App. 72-77.

B. A panel of the Ninth Circuit Court of Appeals affirmed in part and vacated in part, Pet. App. 1-48, with one judge dissenting as to the Fourth Amendment issues, Pet. App. 48-54.

1. The court of appeals remanded Sheehan's ADA claim against the City and County of San Francisco for trial. Pet. App. 41-45. Acknowledging a disagreement with the Fifth Circuit's decision in *Hainze*, the court of appeals held that a jury should decide whether the accommodations proposed after the fact by Reiter were reasonable. A jury might find that "the situation had been defused sufficiently, following the initial retreat from Sheehan's room, to afford the officers an opportunity to wait for backup and to employ less confrontational tactics, including the accommodations that Sheehan asserts were necessary." Pet. App. 45.

2. As to the § 1983 municipal liability claims against the City and Chief Fong, the court of appeals affirmed. Pet. App. 39-41.

3. Over Judge Graber's dissent, the panel majority (Fisher, J., joined by Noonan, J.) vacated the judgment as to two of Sheehan's § 1983 claims against Holder and Reynolds. Pet. App. 16-39. The majority remanded for trial Sheehan's claims that the officers violated the Fourth Amendment (and had no qualified immunity) when they (a) re-opened her door and (b) used deadly force in response to her knife attack.

a. The full panel held that the officers' initial entry into Sheehan's room was lawful under the Fourth Amendment's emergency aid exception, given Hodge's report of Sheehan's condition and her threats against him. Pet. App. 20-22. As to the officers' decision to get

her door back open, the panel also held as a matter of law that the same emergency aid exception that justified the initial entry continued to apply, and also that the *Tyler* "continuous search" rule applied. Pet. App. 23-25.

That, however, did not end the panel majority's Fourth Amendment analysis of the officers' re-entry. Instead, the majority separately examined whether, notwithstanding an exception to the warrant requirement, the officers acted reasonably in entering Sheehan's room immediately rather than delaying or trying other tactics. Pet. App. 26 & n.9. While the panel majority allowed that a jury might agree that "the officers had reason to fear Sheehan's escape" or "that Sheehan was not contained," Pet. App. 32, 36, it opined that a jury could conclude that the officers acted unreasonably by not "taking Sheehan's mental illness into account" and "forc[ing] a confrontation" when there was "no immediate need to subdue her and take her into custody." Pet. App. 28-29.

On the second prong of immunity analysis, the majority held that its rule – that an otherwise lawful entry must be justified by an additional "immediate need" if officers will face armed and violent resistance – was clearly established. Pet. App. 32-36.

b. As to Sheehan's deadly force claim, the full panel held that both officers' "use of deadly force – *viewed from the standpoint of the moment of the shooting* – was reasonable as a matter of law." Pet. App. 37. Nonetheless, the panel majority denied

qualified immunity on this claim because, in its view, a jury could find the entry violated the Fourth Amendment as discussed above. In the majority's view, that would render the officers liable for the deadly force they used to defend themselves against Sheehan. The majority invoked a line of Ninth Circuit decisions holding that when police officers have identified themselves but make an entry held to violate the Fourth Amendment, they have "provoked" any subsequent attack on them and therefore cannot use force in self-defense without violating the Fourth Amendment. Pet. App. 37-38.

4. Judge Graber dissented from the disposition of the Fourth Amendment claims against the officers. Pet. App. 48-54. Judge Graber would have held that Sheehan could not create a Fourth Amendment question by relying on a litigation expert who criticized the officers' decision to make an otherwise lawful entry as "imprudent or inappropriate." Pet. App. 50. Judge Graber also would have held that a reasonable officer could have concluded that the second entry was lawful under exceptions to the warrant requirement. Like the district court, Judge Graber noted "the need to resolve an ongoing emergency that involved a deadly weapon" and the prohibition on using 20/20 hindsight to judge the reasonableness of an officer's actions. Pet. App. 52-53. As to whether the law was clearly established, Judge Graber believed the majority erroneously applied a new rule for police officers dealing with the mentally ill: "In view of the extant legal principles, reasonable officers could conclude

that their actions were permitted even though Plaintiff suffered from a mental illness. Police officers often interact with individuals who have a wide variety of specific needs, and there is no controlling case law that requires a different Fourth Amendment analysis for an officer on the street who faces those circumstances." Pet. App. 53.

SUMMARY OF ARGUMENT

I. Title II of the Americans with Disabilities Act did not require the two San Francisco police officers here to provide accommodations to Sheehan.

A. First, the danger Sheehan posed to these officers – and potentially to the public – at the time the officers re-opened her door meant that she was not "qualified," 42 U.S.C. § 12132, to invoke a public entity's duty to modify its activities to accommodate her. Under this Court's past decisions as well as the Attorney General's implementing regulations, a person who poses a direct threat or significant risk to the safety of others is not qualified for accommodations under the ADA. Whether a significant risk exists must be based on a reasonable judgment made from the standpoint of the person from whom an accommodation is demanded – here, the two officers on the scene. The judgment that Sergeant Reynolds and Officer Holder made in this case – that Sheehan posed a significant risk to them and to the public, requiring her to be disarmed and detained immediately – was

an objectively reasonable one in light of the information they had and the time pressures they faced.

This rule – that an armed and dangerous individual is not qualified for accommodations in public services and activities, and that police officers need not provide accommodations to someone who poses a direct threat to safety in their reasonable judgment – is consistent with other court decisions and regulations construing the disability laws. Any other rule that would require police officers to determine whether violent conduct is caused by mental illness before responding to immediate safety risks is not tenable.

B. Delaying Sheehan's arrest – the accommodation proposed here, after the fact – was not reasonable. The officers at the scene made a reasonable judgment that this proposed accommodation would not have eliminated the significant risk Sheehan posed so long as she was out of custody. Separately, it was not reasonable to expect the officers to delay Sheehan's arrest to accommodate her, given the danger the officers faced, the risks delay would have created, and the officers' duties toward the public at large.

II. The two officers have qualified immunity from Sheehan's Fourth Amendment claims. The divided panel incorrectly held it was clearly established that even where an exception to the Fourth Amendment warrant requirement applies, police officers are required to desist from entering the residence of an armed and violent suspect who is mentally ill, by

reason of the suspect's anticipated resistance, unless they can demonstrate some "immediate need" to enter – and if the officers do enter, the Fourth Amendment prohibits them from using force to defend themselves against the suspect's "provoked" attack. This rule contradicts this Court's precedents, it was not clearly established by Ninth Circuit precedents, and there is no robust consensus of authority in favor of the Ninth Circuit's rule. To the contrary, there is a deep conflict between the panel's rule – particularly its "provocation" rule – and the decisional law of the courts of appeals and State statutes. Finally, even if there were an "immediate need" test, a reasonable officer in petitioners' position could have concluded that test was met here.

ARGUMENT

I. Sheehan Was Not Entitled To Receive Accommodations In Her Arrest Under Title II Of The Americans With Disabilities Act

The Americans with Disabilities Act requires many adjustments to the activities of public and private entities alike, to ensure full access for people with disabilities. But pervasive in the ADA is the recognition that conduct posing a threat to the safety of others need not be accommodated. Whether applied to employers, businesses serving the public, or government agencies, the ADA does not create a duty to accommodate people with disabilities where doing so risks the safety of others. That is why Sheehan

cannot make out an ADA claim here. Sheehan first threatened to kill her social worker, then actually attacked the petitioner police officers who responded to her residence. Brandishing a knife, Sheehan forced the officers back and slammed her door on them. With her door closed, the officers could not know whether she would attempt to escape, attack them, or fortify herself to fight her inevitable arrest. What was certain, however, was that Sheehan was armed and violent and the officers could not know what she was doing behind a closed door. Given these risks, the officers made a reasonable judgment, as the ADA permits, that Sheehan posed a significant risk to safety – and that delaying her arrest was an unacceptable option because it would not eliminate the significant risk she posed. Given that reasonable judgment, Sheehan was not entitled to any deviation from what officers do when anyone – disabled or not – assaults them with a deadly weapon.

A. Because Sheehan's Armed Violence Posed A Direct Threat In The Reasonable Judgment Of The Officers, She Was Not Entitled To Accommodations In Her Arrest

1. Title II of the ADA forbids public entities from discriminating against a "qualified individual with a disability." 42 U.S.C. § 12132. The duty of nondiscrimination extends to requiring public entities to make "reasonable modifications" to their services and

activities to enable full participation by a qualified disabled individual. 28 C.F.R. § 35.130(b)(7) (2014);[2] *see Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 606 n.16 (1999) (Title II's "reasonable modification" requirement imposes same duties as "reasonable accommodation" requirement of the Rehabilitation Act of 1973, 29 U.S.C. § 794). In general, whether an individual is "qualified" depends on whether he or she meets the "essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2) (defining "qualified individual with a disability").

2. But there is one overarching eligibility requirement for invoking the protections of the ADA: an individual cannot pose a significant risk to the safety of others. That principle originated in *School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987), where this Court construed the "qualified" requirement of the Rehabilitation Act not to require the hiring of a person "who posed a significant risk of communicating an infectious disease to others." *Id.* at 287,

---

[2] The Attorney General has the statutory charge of issuing regulations and technical guidance to public entities for most activities subject to Title II. 42 U.S.C. §§ 12134, 12206(c)(1); *Bragdon v. Abbott*, 524 U.S. 624, 646 (1998). *See* 28 C.F.R. pt. 35. In interpreting Title III of the ADA, this Court has noted that the Attorney General's regulations are entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). *Bragdon*, 524 U.S. at 646. All C.F.R. references are to the 2014 compilation.

n.16. Congress later incorporated this safety principle into the Rehabilitation Act and other disability laws, including the ADA. *Bragdon v. Abbott*, 524 U.S. 624, 649 (1998).

a. The Attorney General's Title II regulations now provide that "[a] public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities." 28 C.F.R. § 35.130(h). Title II "does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others." 28 C.F.R. § 35.139(a); *see also* United States Department of Justice, *Americans with Disabilities Act Title II Technical Assistance Manual*, at II-2.8000, Qualified individual with a disability (1993) ("An individual who poses a direct threat to the health or safety of others will not be 'qualified.'"). A "direct threat" means "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services as provided in § 35.139." 28 C.F.R. § 35.104. A public entity must make an "individualized assessment, based on reasonable judgment" whether a significant risk exists, relying on "current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur, and whether reasonable modifications of policies, practices, or

procedures or the provision of auxiliary aids or services will mitigate the risk." 28 C.F.R. § 35.139(b).[3] Consistent with this regulation, this Court has explained that whether a significant risk exists "must be determined from the standpoint of the person who refuses the treatment or accommodation, and the risk assessment must be based on medical or other objective evidence." *Bragdon*, 524 U.S. at 649 (construing analogous Title III regulation).

b. What is a "reasonable" judgment about safety means different things in different situations, depending on "the standpoint of the person who refuses the treatment or accommodation," *id.* For example, under *Bragdon*, a "health care professional" evaluating the risk of transmitting an infectious disease during an elective, non-emergency procedure has a "duty to assess the risk of infection based on the objective, scientific information available to him and others in his profession." *Id.* The standpoint of a medical professional allows for time and research to ensure that a risk assessment is based on the best scientific knowledge available. *Cf.* 56 Fed. Reg. 35694, 35701 (1991), reprinted in 28 C.F.R. pt. 35, App. B, § 35.104 (listing public health authorities that can provide guidance in assessing risk).

---

[3] These regulations allow that a reasonable modification might mitigate or eliminate a significant risk to safety. For the reasons discussed *infra* in Section I.B.1., that provision does not assist Sheehan here.

But not everyone who must make a safety judgment enjoys the time and resources of a medical professional – and the reasonable judgment standard reflects that reality. Indeed, when an individual employee of a covered entity must make an on-the-spot judgment about safety, a wide range of decisions will be considered reasonable. For example, an individual selling ferry tickets makes a reasonable safety judgment, when she must make a snap decision not to sell a first-class ticket to a visually impaired individual with a guide dog, because the first-class area has been designated animal-free to protect those with severe allergies. *Lockett v. Catalina Channel Express, Inc.*, 496 F.3d 1061, 1065 (9th Cir. 2007) (construing Title III "direct threat" regulation, 28 C.F.R. § 36.208). An individual's circumstantial decision may be "reasonable" even if it would not be reasonable for the entity itself, after deliberation, to maintain the same policy over the long term. *Id.* at 1066; *cf. Doe v. Woodford County Bd. of Educ.*, 213 F.3d 921, 925-926 (6th Cir. 2000) (reasonable judgment for school to prohibit hepatitis-B-positive hemophiliac student from participating on basketball team for a three-week period while evaluating safety threat, even though school ultimately concluded threat was not significant and allowed student to participate).

And when a police officer in the field is confronted with an armed and violent individual, what is a "reasonable" judgment is considered from the officer's standpoint. The officer must make a quick decision about whether there is a significant risk to

safety. Not only that, the risk at issue is not abstract, potential, or future; the officer has no choice but to assess the risk now, as she faces it. The challenge of assessing risk in this situation bears more than passing resemblance to the challenge of determining how much force to use to effect an arrest under the Fourth Amendment. As this Court observed in *Graham v. Connor*, 490 U.S. 386 (1989), "police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving." *Id.* at 397. Under those circumstances, whether an officer has made a reasonable judgment about a significant risk is properly judged "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," just as under *Graham*, 490 U.S. at 396. The Fourth Circuit has correctly noted that *Graham*'s rationale for respecting the officer's perspective should apply equally to ADA claims: "[A]s in the criminal procedure context, we are reluctant to question the snap judgments of law enforcement officials in situations in which a reasonable officer would fear for his safety and for the safety of those he is charged to protect." *Seremeth v. Bd. of County Commissioners, Frederick County*, 673 F.3d 333, 340 (4th Cir. 2012) (denying Title II reasonable accommodation claim as a matter of law). "Just as the constraints of time figure in what is required of police under the Fourth Amendment, they bear on what is reasonable under the ADA." *Waller v. City of Danville*, 556 F.3d 171, 175 (4th Cir. 2009). Both tests call for respecting judgments about risk made by the officers on the scene who must "instantaneously identify,

assess, and react to potentially life-threatening situations." *Hainze*, 207 F.3d at 801.

Like the *Graham* test, whether there was a "reasonable judgment" under the ADA turns on "objective evidence," not good-faith belief. *Bragdon*, 524 U.S. at 649. The purpose of this requirement is to ensure that ADA safety judgments are based on evidence about the individual, not stereotypes about disability. *Cf. Arline*, 480 U.S. at 284-85. Thus, no one may conclude that someone is dangerous based on the mere existence of mental illness. It is entirely proper under the statute, however, to make safety judgments when a particular mentally ill individual has recently committed violent acts or directly threatened harm. *Cf.* H.R. Rep. No. 485(III), 101st Cong., 2d Sess. 45-46 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 468-469 (stating, with reference to Title I: "The purpose of creating the 'direct threat' standard is to eliminate exclusions which are not based on objective evidence about the individual involved. Thus, in the case of a person with mental illness there must be objective evidence from the person's behavior that the person has a recent history of committing overt acts or making threats which caused harm or which directly threatened harm.").

c. The "reasonable judgment" standard not only involves consideration of what is "reasonable" – it also recognizes room for "judgment."

Allowing room for judgment does not require deference to an officer's subjective beliefs, but it does

require respect for the range of reasonable judgments that an officer on the scene could make, based on the objective facts. The court of appeals below did not do that. But other courts have. *See Seremeth*, 673 F.3d at 340; *Waller*, 556 F.3d at 175. Some degree of deference to professional judgments is normal in other disability law contexts, when it comes to safety and other essential eligibility requirements. *See, e.g.*, *Arline*, 480 U.S. at 288 ("[C]ourts normally should defer to the reasonable medical judgments of public health officials."); *E.E.O.C. v. Amego, Inc.*, 110 F.3d 135, 147 (1st Cir. 1997) (stating, in a Title I case involving safety risks, "where no evidence of differential treatment, discrimination or stereotyping is proffered, the employer's judgment is entitled to some weight"); *cf. Olmstead*, 527 U.S. at 602 ("[T]he State may generally rely on the reasonable assessments of its own professionals in determining whether an individual 'meets the essential eligibility requirements' for habilitation in a community-based program.") (dictum); *Halpern v. Wake Forest Univ. Health Sciences*, 669 F.3d 454, 463 (4th Cir. 2012) (deference to academic judgments); *Peters v. City of Mauston*, 311 F.3d 835, 845 (7th Cir. 2002) (stating "we do not second-guess the employer's judgment as to the essential functions" of a job).

Moreover, the concept of "judgment" necessarily recognizes that different judgments about safety can be made from the same set of available facts. A safety judgment can still be reasonable even if it is not the only reasonable conclusion the decisionmaker could

reach. For example, in *Bragdon*, this Court explained that "[a] health care professional who disagrees with the prevailing medical consensus" regarding safety risks "may refute it by citing a credible scientific basis for deviating from the accepted norm." 524 U.S. at 650. And a safety judgment can still be reasonable even if there is some evidence indicating the risk was less than significant. *Theriault v. Flynn*, 162 F.3d 46, 50 (1st Cir. 1998) (reasonable judgment by driver's license officer to require road test before renewing license of motorist with cerebral palsy, even though driver had spotless record).

3. Applied to this case, this test requires asking whether Reynolds and Holder made a reasonable judgment, based on the objective, available information, that Sheehan posed a significant risk to the safety of others. They did.

As required by 28 C.F.R. § 35.139(b), their judgment was individualized and was not based on generalizations or stereotypes about Sheehan's disability. Instead, the objective evidence abundantly supported their conclusion that Sheehan was a dangerous individual. The officers not only knew about Sheehan's threat against Hodge, they also had Hodge's determination – supported by his familiarity with Sheehan's history – that she needed to be hospitalized because she posed a danger to others. And then Sheehan actually threatened to kill the officers and forced them out of her room with a knife.

The officers' conclusion that Sheehan was dangerous even after she closed her door on them was also a reasonable judgment. At that point, Sheehan's violence was escalating, and the officers did not know what her next move would be or whether anyone else was in danger. Sheehan could be trying to escape out the back window and down a fire escape, at a time when backup officers were not yet covering the rear of the building. Or Sheehan could be gathering up her other knives – or weapons the officers hadn't seen – to mount a new attack or fortify herself against Reynolds and Holder or any other officers who would, sooner or later, have to come in to arrest her. Whatever Sheehan was going to do next, the door was closed, and the officers could not respond to what they could not see. And these risks would persist until Sheehan was disarmed and taken into custody. 28 C.F.R. § 35.139(b) ("duration" of risk relevant). An officer could make a reasonable judgment that the "probability" and "severity" of harm made the risk "significant." *Id.*; *cf. Hutton v. Elf Atochem N. Am., Inc.*, 273 F.3d 884, 894 (9th Cir. 2001) (finding "significant risk" where chemical plant worker could have diabetic seizure and cause chemical spill, even though "the likelihood that the potential harm will occur is small").

Given the undisputed facts about Sheehan's conduct and the uncertainty faced by the officers, the court of appeals erred in finding a question for trial. The court of appeals stated there was a triable issue about the safety risk posed by Sheehan once she was behind her door, because "all of the information

known to the officers suggested that Sheehan wanted only to be left alone in her home," and "[s]he had shown no desire to leave the room." Pet. App. 30. But that analysis is inconsistent with *Bragdon*: no scientific or medical opinion supported this judicial assessment of Sheehan's psyche. And evidentiary problems aside, the court of appeals asked the wrong question under the ADA. The court of appeals asked whether a "reasonable jury" could conclude the officers should have proceeded differently, not whether the officers made a "reasonable judgment" that a "significant risk" existed. On the facts known to them, the officers' judgment was reasonable and there is no triable issue of fact on this claim.

4. The rule petitioners advocate here – that when an officer makes a reasonable judgment that a resisting suspect poses a significant risk of harm, the ADA does not require the officer to provide accommodations – is consistent with the statutory scheme and sound policy.

a. Dangerous behavior, regardless whether it is caused by disability, does not create an occasion for police officers to provide accommodations under Title II. As the Fifth Circuit explained, "[w]hile the purpose of the ADA is to prevent the discrimination of disabled individuals, we do not think Congress intended that the fulfillment of that objective be attained at the expense of the safety of the general public." *Hainze*, 207 F.3d at 801. When officers are responding to violent and "objectively verifiable misconduct," even conduct related to a mental illness,

"[s]uch reasonable police behavior is not discrimination." *Bates v. Chesterfield County*, 216 F.3d 367, 373 (4th Cir. 2000); *accord De Boise v. Taser Intern., Inc.*, 760 F.3d 892, 899 (8th Cir. 2014) (no Title II violation where officers responded with force to assault by mentally ill individual); *Gohier v. Enright*, 186 F.3d 1216, 1222 (10th Cir. 1999) (same); *cf. Tucker v. Tennessee*, 539 F.3d 526, 536 (6th Cir. 2008) (no Title II violation where officers forcibly arrested deaf individual for assault). The Attorney General's guidance similarly acknowledges that "[p]olice officers may, of course, respond appropriately to real threats to health or safety, even if an individual's actions are a result of her or his disability." United States Department of Justice, *Commonly Asked Questions About the Americans with Disabilities Act and Law Enforcement* (Rev. Apr. 4, 2006). This Title II principle is not limited to police officers; public employees generally are not required to accommodate misconduct, even where it stems from disability. *See McElwee v. County of Orange*, 700 F.3d 635, 643 (2d Cir. 2012) (mentally ill individual's sexual harassment of public employees, even though related to disability, disqualified him from program).

b. The principle that violent conduct does not provide an occasion for accommodation is not unique to Title II of the ADA; indeed, it pervades the disability laws. An individual who poses a significant risk to others cannot make demands of an employer under Title I, 42 U.S.C. § 12113(b); 29 C.F.R. § 1630.2(r), or of a business offering a public accommodation under

Title III, 42 U.S.C. § 12182(b)(3); 28 C.F.R. § 36.208. Title I of "the ADA does not require that an employee whose unacceptable behavior threatens the safety of others be retained, even if the behavior stems from a mental disability. Such an employee is not qualified." *Calef v. Gillette Co.*, 322 F.3d 75, 87 (1st Cir. 2003) (citing cases); *see also, e.g., Palmer v. Circuit Court of Cook County, Ill.*, 117 F.3d 351, 352 (7th Cir. 1997) ("The Act protects only 'qualified' employees and threatening other employees disqualifies one."). And a public accommodation subject to Title III is allowed to adopt an "eligibility standard precluding violent or disruptive behavior," "without inquiry into the underlying reason for [a disabled individual's] inability to comply." 56 Fed. Reg. 35544, 35560-61 (1991), reprinted in 28 C.F.R. pt. 36, App. C, § 36.208; *cf.* 56 Fed. Reg. 35694, 35701 (1991), reprinted in 28 C.F.R. pt. 35, App. B, § 35.104 (explaining that Title III principles regarding "questions of safety" apply to "essential eligibility requirements" for participation under Title II). Similarly, private and public transit agencies subject to the U.S. Department of Transportation's regulations may "refuse to provide service to an individual with disabilities because that individual engages in violent, severely disruptive, or illegal conduct." 49 C.F.R. § 37.5(h).

c. Any rule requiring police officers to accommodate a dangerous suspect whose violent conduct is caused by disability would work particular mischief in light of the uncertainty officers face in determining who is disabled and whether it is the disability that

causes violence. Officers "in the midst of a rapidly escalating situation cannot be faulted for failing to diagnose" a mental illness. *Bates*, 216 F.3d at 372. And even when mental illness is present *and* officers know about it, that does not necessarily clarify matters. Mental illness is not always the obvious cause of violence. *Cf. id.* at 369-370 (officers were initially not aware of plaintiff's autism and suspected violent plaintiff was on drugs). The mentally ill and non-mentally ill alike can engage in violence as a result of emotional disturbance or substance abuse, or from personal motives. As the dissenting judge observed, "[p]olice officers often interact with individuals who have a wide variety of specific needs." Pet. App. 53. Indeed, studies suggest that even when seriously mentally ill individuals are violent, the proportion of cases in which the violent behavior was *caused* by mental illness "may be surprisingly small." John Monahan & Henry J. Steadman, *Extending Violence Reduction Principles to Justice-Involved Persons with Mental Illness*, in Dvoskin *et al.* (eds.), *Applying Social Science to Reduce Violent Offending* 245, 246 (2012). Further complicating matters, at least one common cause of violence is excluded from the scope of the ADA: the statute *permits* discrimination against an individual who is "currently engaging in the illegal use of drugs." 42 U.S.C. § 12210(a). Given these difficulties, the proper rule permits officers to address dangerous conduct when it occurs, regardless of the cause.

d. Of course, petitioners do not assert that the actions of individual police officers are never subject to scrutiny under Title II. There is no claim that an arrest is not one of the "services, programs, or activities" of a public entity under 42 U.S.C. § 12132. Nor is there a claim about what reasonable accommodations might be required after an officer "secur[es] the scene and ensur[es] that there is no threat to human life." *Hainze*, 207 F.3d at 801. The only ADA issue here is what Title II requires of individual officers who are facing an armed and dangerous suspect.

B. Modifications To Sheehan's Arrest Would Not Have Eliminated The Significant Risk She Posed, And Were Not Reasonable

1. Assuming a disabled individual's conduct does not pose a direct threat, Title II requires public agencies to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7). Sheehan's ADA claim is that reasonable modifications of her arrest were required here to minimize the risk of harm to her, and the court of appeals agreed that she was entitled to pursue this claim. Pet. App. 44-45.

But before reaching the question whether the proposed accommodations were reasonable – which is addressed below, *infra* Section I.B.2. – the threshold question remains: did Sheehan pose a significant risk? And Sheehan's proposed modifications are relevant to that threshold question. As discussed above, *supra* Section I.A.2., part of the "reasonable judgment" whether an individual poses a significant risk is "whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk." 28 C.F.R. § 35.104. Where a significant risk to safety exists, a plaintiff's proposed modification must "eliminate[ ]" that "significant risk," 28 C.F.R. § 35.104, or "mitigate" it into insignificance, 28 C.F.R. § 35.139(b). *Accord Bragdon*, 524 U.S. at 624 ("Because few, if any, activities in life are risk free, *Arline* and the ADA do not ask whether a risk exists, but whether it is significant."); *Arline*, 480 U.S. at 287 n.16 ("reasonable accommodation" must "eliminate" the "significant risk"); *see also McElwee*, 700 F.3d at 642 (Title II plaintiff must show existence of accommodation).

Sheehan's retained police practices expert, Lou Reiter, has opined that the officers should have delayed Sheehan's arrest – and specifically that the officers should have waited for backup, "should have respected her comfort zone, engaged in non-threatening communications and used the passage of time to defuse the situation rather than precipitating a deadly confrontation." Pet. App. 45.

But the officers' judgment that these measures would not have eliminated the significant risk Sheehan posed to them and others was reasonable. With regard to "non-threatening communications," the officers had already used calm tones when they first approached Sheehan – and she reacted by attacking them. Given that reaction, and Sheehan's earlier hostility toward Hodge, a person she knew, there was no reason for the officers to expect that using calm tones again would render the scene safe. And all of Reiter's remaining proposals involved delaying Sheehan's arrest, in a situation where she would need only seconds to escape down a fire escape, gather more weapons to prepare for an attack, or fortify herself. Based on these facts, an officer on the scene could make a reasonable judgment that delay would not reduce the risk posed by Sheehan to an insignificant level. Indeed, Reiter did not even opine that Sheehan was not a risk; to the contrary, he asserted she was a "barricaded suspect" who presented "a deadly hazard to arresting officers." J.A. 320-321.[4]

---

[4] Reiter also claims that his proposed tactics to deal with the risk Sheehan posed would have been likely to lead to an outcome that did not involve the use of deadly force. J.A. 322. As appealing as that prospect is, that opinion simply blends 20/20 hindsight with speculation. "Scientific evidence and expert testimony must have a traceable, analytical basis in objective fact before it may be considered on summary judgment." *Bragdon*, 524 U.S. at 653; *Waller*, 556 F.3d at 176 (rejecting Title II claim that officers should have tried different tactics during armed standoff).

2. Independently, even if Sheehan were qualified to invoke Title II's requirement that her disability be accommodated with reasonable modifications, her claims fail because the modifications she proposes to her arrest are not "reasonable." *See* 28 C.F.R. § 35.130(b)(7). A proposed modification is unreasonable if it does not "seem[ ] reasonable on its face, *i.e.*, ordinarily or in the run of cases," or if it imposes an undue hardship on the covered entity or anyone else. *U.S. Airways v. Barnett*, 535 U.S. 391, 402 (2002) (Title I decision); *Oconomowoc Residential Programs, Inc. v. City of Milwaukee*, 300 F.3d 775, 783 (7th Cir. 2002) (applying *U.S. Airways* in a Title II case).

Here, the officers made a reasonable judgment that they could not delay Sheehan's arrest without risking their own safety or that of the public. *Supra* Section I.A.3. Given these "overriding public safety concerns," *Tucker*, 539 F.3d at 536, it was unreasonable to demand delay. Even in cases involving far less serious threats to public safety, courts hold it unreasonable as a matter of law to make accommodations that would delay an investigation or arrest. *Seremeth*, 673 F.3d at 340 (investigation of domestic violence complaint involving deaf individual); *Bircoll v. Miami-Dade County*, 480 F.3d 1072, 1086 (11th Cir. 2007) (roadside DUI test involving deaf individual). The Attorney General's guidance acknowledges that officers need not provide accommodations in "urgent situations – such as responding to a violent crime in progress." United States Department of Justice, *Communicating with People Who Are Deaf or Hard of*

Hearing, ADA Guide for Law Enforcement Officers (Jan. 2006). In addition, the officers had the duty here not merely to protect public safety but to arrest Sheehan. Officers are charged with arresting violent felons, and here it is undisputed the officers had probable cause to arrest Sheehan for the violent felony of assault, Pet. App. 65-68 & n.12. And the very reason the officers encountered Sheehan in the first place was to fulfill their duty to take into custody individuals who are mentally ill and judged to pose a threat to others – a duty imposed on law enforcement officers throughout the nation.[5] Given all of these public

---

[5] All fifty States have statutes authorizing police officers to take into custody mentally ill individuals who are a danger to themselves or others. Thirty-nine States authorize police officers to make such a determination themselves. Alaska Stat. Ann. § 47.30.705; Ark. Code Ann. § 20-47-210; Cal. Welf. & Inst. Code § 5150; Colo. Rev. Stat. Ann. § 27-65-105; Conn. Gen. Stat. Ann. § 17a-503; Del. Code Ann. tit. 16, § 5004; Fla. Stat. Ann. § 394.463; Idaho Code Ann. § 66-326; 405 Ill. Comp. Stat. Ann. 5/3-606; Ind. Code Ann. § 12-26-4-1; Iowa Code Ann. § 229.22; Kan. Stat. Ann. § 59-2953; Ky. Rev. Stat. Ann. § 202a.041; La. Rev. Stat. Ann. § 28:53; Md. Code Ann., Health-Gen. § 10-624; Mass. Gen. Laws Ann. ch. 123 § 12; Mich. Comp. Laws Ann. § 330.1427; Minn. Stat. Ann. § 253b.05; Mont. Code Ann. § 53-21-129; Neb. Rev. Stat. Ann. § 71-919; Nev. Rev. Stat. Ann. § 433a.160; N.J. Stat. Ann. § 30:4-27.6; N.M. Stat. Ann. § 43-1-10; N.Y. Mental Hyg. Law § 9.41; N.C. Gen. Stat. Ann. § 122c-262; N.D. Cent. Code Ann. § 25-03.1-25; Ohio Rev. Code Ann. § 5122.10; Okla. Stat. Ann. tit. 43a, § 5-207; Or. Rev. Stat. Ann. § 426.228; 50 Pa. Cons. Stat. Ann. § 4405; S.D. Codified Laws § 27a-10-3; Tenn. Code Ann. § 33-6-402; Tex. Health & Safety Code Ann. § 573.001; Utah Code Ann. § 62a-15-629; Va. Code Ann. § 37.1-67.01; Wash. Rev. Code Ann. § 71.05.153; W. Va. Code Ann. § 9-6-5; Wis. Stat. Ann. § 51.20; Wyo. Stat. Ann. § 25-10-109. Three States allow officers to make that determination

(Continued on following page)

safety duties, the demanded accommodation of delay was not reasonable.

The unreasonableness of the accommodation demanded here was only aggravated by the rapidly unfolding circumstances, which did not permit any of the process that typically occurs when a covered entity considers an accommodation. Although the accommodation process normally begins with an actual request for accommodation, there was none here. *See, e.g., Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 579 (2d Cir. 2003) ("[A] plaintiff must first use the procedures available to notify the governmental entity that it seeks an exception or variance from the facially neutral laws when pursuing a reasonable accommodation claim."). There was no "interactive process" here either; that cannot happen when an individual is threatening and attacking public employees. *See Barber ex rel. Barber v. Colorado Dept. of Revenue*, 562 F.3d 1222, 1231 (10th Cir. 2009) (Rehabilitation Act) ("[B]oth parties have an obligation to proceed in a reasonably interactive manner to

---

themselves in emergency situations, but otherwise require officers to act at the direction of a court or a mental health professional. Me. Rev. Stat. tit. 34, § 3862; R.I. Gen. Laws Ann. § 40.1-5-7; Vt. Stat. Ann. tit. 18, § 7505. Eight States allow police officers to take mentally ill individuals into custody at the direction of a court or a mental health professional. Ala. Code § 22-52-91; Ariz. Rev. Stat. Ann. § 36-525; Ga. Code Ann. § 37-3-41; Haw. Rev. Stat. § 334-59; Miss. Code Ann. § 41-21-67; Mo. Ann. Stat. § 632.300; N.H. Rev. Stat. Ann. § 135-C:29; S.C. Code Ann. §§ 44-17-410, 44-17-430, 44-17-440.

ascertain a reasonable accommodation.") (internal quotation marks omitted); *cf.* 29 C.F.R. § 1630.2(o)(3) ("informal interactive process" for employment accommodation). And covered entities normally have some opportunity to weigh safety risks. *See Doe*, 213 F.3d at 926 (no violation of ADA when school assessed safety risk during a three-week hold on hemophiliac, hepatitis-B-positive student's participation on basketball team). This is not to say that a public entity has no duty to accommodate people with disabilities under circumstances where the accommodations dialogue cannot occur. But the fact that the officers here had so little information about what Sheehan would or could do, and so little time to prevent any escape or attack she might have attempted, underscores that their decisionmaking should not be subjected to the same standards as a deliberative decision reached after the interactive process – a perspective that fits comfortably with an application of the "reasonable judgment" test that respects the constraints faced by the accommodations decisionmaker.

3. Finally, a modification is also not required under Title II if it "would fundamentally alter the nature of the service, program, or activity," 28 C.F.R. § 35.130(b)(7); *cf. PGA Tour, Inc. v. Martin*, 532 U.S. 661, 682-683 (2001) (Title III). Requiring public employees to accommodate a direct threat to their safety is a fundamental alteration of any activity subject to Title II, because Title II "does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of

that public entity when that individual poses a direct threat to the health or safety of others." 28 C.F.R. § 35.139(a). Moreover, because the intrinsic nature of the officers' duty here was to take Sheehan into custody as quickly as possible to protect public safety, as they reasonably concluded they must, any requirement that they delay performing their duty would amount to a fundamental alteration.

II. The Officers Have Qualified Immunity, Because It Was Not Clearly Established That Even Where An Exception To The Warrant Requirement Applied, An Entry Into A Residence Could Be Unreasonable Under The Fourth Amendment By Reason Of The Anticipated Resistance Of An Armed And Violent Suspect Within

Under the Ninth Circuit's Fourth Amendment rule, an officer deciding whether to enter a residence can no longer rely on the existence of an established exception to the warrant requirement, or the *Tyler* "continuous search" rule. Rather, in cases involving armed and violent suspects, an officer cannot enter *even under an established exception to the warrant requirement* when it would "force a confrontation" with a violent suspect and there is "no immediate need to subdue [the suspect] and take [the suspect] into custody." Pet. App. 29. As a consequence, if the officer enters, she is constitutionally prohibited from defending herself against the suspect – even if, as the Ninth Circuit found here, deadly force is otherwise

a reasonable response to an armed attack. Pet. App. 36-39.

But this Fourth Amendment rule was not clearly established in 2008, when the officers relied on established exceptions to the warrant requirement and the *Tyler* "continuous search" rule to re-enter Sheehan's room to arrest her. The law is clearly established only when "every reasonable official would have understood that what he is doing violates that right." *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2083 (2011) (internal quotation marks omitted). The law and its application to the specific situation must be so clear-cut that it is "beyond debate" that the action would violate the Constitution. *Id.* The standard "gives ample room for mistaken judgments." *Hunter v. Bryant*, 502 U.S. 224, 229 (1991). Unless only a "plainly incompetent" official could have considered her actions lawful in light of existing precedent, qualified immunity protects the officer. *Stanton v. Sims*, 134 S. Ct. 3, 5 (2013) (per curiam). Here, the law was not clearly established – not merely because the cases the Ninth Circuit relied on did not establish its purported rule beyond doubt, but because decisions of this Court and other circuits cast significant doubt on whether the Ninth Circuit's understanding of the Fourth Amendment was correct. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (courts have discretion in qualified immunity cases whether to address underlying constitutional question).

A. Federal Cases Did Not Clearly Establish The Need For Officers To Desist From Entering When They Can Anticipate Resistance

1. None of this Court's past rulings clearly established that officers acting under an established exception to the warrant requirement must delay making an entry into a residence, where they can expect armed resistance by a suspect. In imposing that duty here, the Ninth Circuit relied on *Brigham City v. Stuart*, 547 U.S. 398, 406 (2006), which stated that the "manner of entry" during an emergency search must be reasonable. Pet. App. 18. But as to the "manner of entry," *Stuart* required nothing more than compliance with "the Fourth Amendment's knock-and-announce rule," 547 U.S. at 407 – which the officers did here, Pet. App. 22. And this Court has never held that the *Tyler* "continuous search" rule is suspended when, as here, a suspect's armed resistance is what interrupts a lawful search. Nor does any other decision of this Court hold that when an established exception to the warrant requirement applies, officers may need to delay or desist from entering for any reason, let alone the reasons cited by the Ninth Circuit here.

To the contrary, the premise of the Ninth Circuit's new rule – that officers must refrain from a lawful entry based on a suspect's anticipated armed resistance, unless there is an "immediate need" to enter – conflicts with this Court's decision in *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967). In

Hayden, this Court held that when a resisting suspect has access to weapons in a home, that is an exigent circumstance that justifies an immediate entry, not delay. A reasonable officer could conclude *Hayden* applies here: "Speed here was essential, and only a thorough search of the house for persons and weapons could have insured that Hayden was the only man present and that the police had control of all weapons which could be used against them or to effect an escape." *Id.* at 299; *cf. Hudson v. Michigan*, 547 U.S. 586, 595 (2006) (observing that undue delay in making an entry can "produc[e] preventable violence against officers").

The Ninth Circuit's new rule is inconsistent with another key principle of this Court's Fourth Amendment decisions: that when a person responds unlawfully to lawful police activity, she does not *expand* her Fourth Amendment rights. A suspect who is about to be lawfully arrested cannot "retreat into her house" and thereby "thwart an otherwise proper arrest." *United States v. Santana*, 427 U.S. 38, 42 (1976). To require officers to change their tactics because of a suspect's unlawful resistance could amount, for some suspects, to "impunity-earned-by-recklessness." *Scott v. Harris*, 550 U.S. 372, 386 (2007). Moreover, it is not practical for well-established Fourth Amendment rules – like the exigent circumstances exception – to switch on and off depending on a prediction about who might respond unlawfully and who might not. That "would create unacceptable and unwarranted difficulties for law enforcement officers who must

make quick decisions in the field" as well as for any factfinder attempting to judge that prediction in hindsight. *Kentucky v. King*, 131 S. Ct. 1849, 1860 (2011) (holding that officers do not "manufacture" exigent circumstances when they attempt a "knock-and-talk," and someone inside starts to destroy evidence in response, even if that response is predictable).

Further complicating the "clearly established law" analysis, there are few hard-and-fast rules about the "manner of searching." *United States v. Banks*, 540 U.S. 31, 35 (2003). Rather, this Court has construed the Fourth Amendment reasonableness requirement "case by case, largely avoiding categories and protocols for searches. Instead, we have treated reasonableness as a function of the facts of cases so various that no template is likely to produce sounder results than examining the totality of circumstances in a given case. " *Id.* at 36. That approach, though faithful to the Fourth Amendment, has not produced a clearly established rule that would control here.

The court of appeals did not discuss any of this authority. Instead, it simply invoked *Stuart*'s general requirement that a search be conducted in a "reasonable manner." Pet. App. 18. In doing so, the Ninth Circuit failed to heed this Court's repeated admonition "not to define clearly established law at a high level of generality" in conducting qualified-immunity analysis. *Al-Kidd*, 131 S. Ct. at 2084.

2. Not only did the Ninth Circuit selectively rely on "equivocal" statements from this Court's past

decisions, it also mistakenly found clearly established law based on its own "readily distinguishable" precedents. *Stanton*, 134 S. Ct. at 7.

To begin with, no past Ninth Circuit decision had construed *Stuart*'s "manner of entry" discussion to require anything beyond (1) complying with the knock-and-announce rule, and (2) limiting an emergency search to those areas associated with the particular emergency. *United States v. Snipe*, 515 F.3d 947, 954 (9th Cir. 2008). The Ninth Circuit cited two other "manner of search" decisions in its Fourth Amendment analysis, Pet. App. 18-19, but neither case provided a clear rule for petitioners here. *See Boyd v. Benton County*, 374 F.3d 773, 779 (9th Cir. 2004) (whether it was excessive force to use flash-bang grenades to execute a warrant search when innocents were present); *Franklin v. Foxworth*, 31 F.3d 873, 876 (9th Cir. 1994) (whether officers conducting a search unnecessarily prolonged the detention of a gravely ill, elderly man who was semi-naked).

Similarly, none of the "continuous search" decisions in the Ninth Circuit's Fourth Amendment analysis clearly established the rule the Ninth Circuit imposed on Reynolds and Holder. Pet. App. 24 (discussing *Fisher v. City of San Jose*, 558 F.3d 1069 (9th Cir. 2009) (en banc); *United States v. Kaplan*, 895 F.2d 618, 623 (9th Cir. 1990); and *United States v. Echegoyen*, 799 F.2d 1271, 1280 (9th Cir. 1986)). Indeed, the panel's rule – treating armed resistance as a reason to enhance Fourth Amendment protections – is inconsistent with the Ninth Circuit's 2009

en banc decision in *Fisher v. City of San Jose*: "We reject the notion that trained officers, who put themselves in harm's way when handling a dangerous armed standoff, essentially increase the constitutional rights of suspects who, by their actions, both provoke and prolong the need for continuing police action." *Fisher*, 558 F.3d at 1080. Where a divided 2014 panel embraced a notion that an en banc court expressly rejected in 2009, the rule was not clearly established for police officers in 2008.

And the three decisions the Ninth Circuit discussed in its qualified immunity analysis, Pet. App. 32-36, fare no better. None of these decisions clearly established that the timing or tactics of an otherwise lawful entry could render it unlawful, and none of them involved the *Tyler* "continuous search" rule. First, the Ninth Circuit relied on *Graham v. Connor* to clearly establish the law here, treating *Graham*'s general "reasonableness" principle as if it established "the legal constraints on [the] particular police conduct" at issue here – and thereby repeating the error this Court corrected in *Saucier v. Katz*, 533 U.S. 194, 205 (2001). Second, the Ninth Circuit cited *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001), another force decision that had nothing to do with entries, but did involve a mentally disturbed person who – unlike Sheehan – was unarmed, posed no threat, and had assaulted no one. *Id.* at 1285. And the third case, *Alexander v. City and County of San Francisco*, 29 F.3d 1355 (9th Cir. 1994), did not clearly establish the Ninth Circuit's rule either. Admittedly, *Alexander*

involved Fourth Amendment entry and force claims premised on officers' decision not to wait before entering the home of an armed mentally ill person. But on those facts, *Alexander* held that a jury should determine factual disputes affecting the legality of the officers' entry and the reasonableness of the force used to make the entry. *Id.* at 1366-67. But *Alexander* is "readily distinguishable," *Stanton*, 134 S. Ct. at 7. Petitioners here, unlike the officers in *Alexander*, were indisputably entering under an established exception to the warrant requirement. *Cf. Alexander*, 29 F.3d at 1361 ("Without an arrest warrant, *and without exigent circumstances*, the police had no right to enter Quade's house for the primary purpose of arresting him.") (emphasis added). Moreover, as the dissenting judge observed, Pet. App. 50-51, the Ninth Circuit subsequently limited *Alexander* to its facts, holding that so long as an entry satisfies an exception to the warrant requirement, it does not violate the Fourth Amendment even if it is "imprudent" or "inappropriate" or even "reckless." *Billington v. Smith*, 292 F.3d 1177, 1188-90 (9th Cir. 2002). Given the Ninth Circuit's "important limitations on *Alexander*," *Billington*, 292 F.3d at 1188, it was not beyond debate in 2008 that these officers could not proceed under an established exception to the warrant requirement. *Compare* Pet. App. 49-51 (dissent), *with* Pet. App. 35 n.11 (majority opinion, acknowledging that "*Alexander* has been limited by subsequent circuit precedent" but concluding that precedent did not apply here).

In denying qualified immunity, the Ninth Circuit also faulted Reynolds and Holder for not giving more consideration to Sheehan's mental illness. Pet. App. 35. But several past Ninth Circuit decisions held that even when an armed individual appears mentally disturbed, officers may take action to secure a deadly weapon. *Long v. City and County of Honolulu*, 511 F.3d 901, 906 (9th Cir. 2007) (armed suspect's "agitated" behavior contributed to reasonableness of force); *Blanford v. Sacramento County*, 406 F.3d 1110, 1117-18 (9th Cir. 2005); *Reynolds v. County of San Diego*, 84 F.3d 1162, 1168 (9th Cir. 1996) (holding deadly force proper when suspect was reported to be behaving in a "strange" and "erratic" manner and suddenly picked up his knife), *overruled on other grounds, Acri v. Varian Associates, Inc.*, 114 F.3d 999, 1000 (9th Cir. 1997). By contrast, the majority here relied on two past decisions involving mentally ill subjects who were not assaultive. *Cf. Drummond v. City of Anaheim*, 343 F.3d 1052, 1058 (9th Cir. 2003); *Deorle*, 272 F.3d at 1283. But a *different* Ninth Circuit panel distinguished those two cases on that very ground, in a decision upholding the use of force against a mentally ill individual that was issued shortly *before* the incident here. *See Gregory v. County of Maui*, 523 F.3d 1103, 1108-09 (9th Cir. 2008). Thus, the best that could be said here is that "this area is one in which the result depends very much on the facts of each case." *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004). Under those circumstances, immunity applies.

Thus, the Ninth Circuit's own cases did not clearly establish the rule here. Indeed, there was not even a consensus for the majority's new rule on the part of the judges in this case. Four Article III judges have already weighed in on this Fourth Amendment question, with two judges coming down on the side of the officers and two against. "If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 618 (1999).

3. "Absent controlling authority," "a robust consensus of cases of persuasive authority" is necessary to clearly establish the law. *Al-Kidd*, 131 S. Ct. at 2084; *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014). There is no out-of-circuit consensus for the majority's rule here.

a. To the contrary, published decisions in the First, Fifth, and Eleventh Circuits found no Fourth Amendment liability in similar situations where officers made an entry (or re-entry) to arrest an armed and violent individual who was mentally disturbed, and ended up using deadly force. Unlike the majority's decision here, each of these decisions confined the Fourth Amendment entry inquiry to whether an exception to the warrant requirement applied. None of these other circuits' decisions held that a Fourth Amendment violation could arise from a finding that it was unwise for officers to enter, given the likelihood that they could end up needing to use deadly force against an armed and violent

mentally ill person. *See Rice v. ReliaStar Life Ins. Co.*, 770 F.3d 1122, 1131-33 (5th Cir. 2014); *Harris v. Serpas*, 745 F.3d 767, 773 (5th Cir. 2014); *Rockwell v. Brown*, 664 F.3d 985, 991 (5th Cir. 2011), *cert. denied*, 132 S. Ct. 2433 (2012); *Estate of Bennett v. Wainwright*, 548 F.3d 155, 161, 169-170, 174-75 (1st Cir. 2008); *Buchanan v. Maine*, 469 F.3d 158, 169-70 (1st Cir. 2006); *Menuel v. City of Atlanta*, 25 F.3d 990, 996 (11th Cir. 1994). Similarly, other courts have rejected the notion that officers cannot respond to violent conduct from a mentally ill individual in the same way they can respond to violent conduct by other individuals. "Knowledge of a person's disability simply cannot foreclose officers from protecting themselves, the disabled person, and the general public when faced with threatening conduct by the disabled individual." *Bates v. Chesterfield County*, 216 F.3d 367, 372 (4th Cir. 2000); *see also, e.g.*, *Sanders v. City of Minneapolis*, 474 F.3d 523, 527 (8th Cir. 2007) ("The fact that Alfred may have been experiencing a bipolar episode does not change the fact that he posed a deadly threat against the police officers."); *Menuel*, 25 F.3d at 997 ("No responsible officer could disregard the palpable indications of imminent violence. .").

b. Separate from the issue of mental illness, several other circuits refuse to hold that police officers are constitutionally at fault for "causing" an arrestee to respond violently when they make an otherwise lawful arrest. Not only does such a rule excuse violence against law enforcement officers, it ignores that "police must pursue crime and constrain

violence, even if the undertaking itself causes violence from time to time." *Id.* As the Seventh Circuit explained, every Fourth Amendment force case "begin[s] with the decision of a police officer to do something, to help, to arrest, to inquire. If the officer had decided to do nothing, then no force would have been used. In this sense, the police officer always causes the trouble." *Plakas v. Drinski*, 19 F.3d 1143, 1150 (7th Cir. 1994). So long as the force ultimately used is reasonable at the moment it is used – as the Ninth Circuit found here, Pet. App. 37-39 – "[t]he reasonableness of the officer's actions in creating the dangerous situation is not relevant to the Fourth Amendment analysis." *Waterman v. Batton*, 393 F.3d 471, 477 (4th Cir. 2005); *see also, e.g.*, *Harris*, 745 F.3d at 772 (stating "any of the officers' actions leading up to the shooting are not relevant for the purposes of an excessive force inquiry in this [Fifth] Circuit"); *Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996) ("Officer Proulx's actions leading up to the shooting are irrelevant to the objective reasonableness of his conduct at the moment he decided to employ deadly force."); *Schulz v. Long*, 44 F.3d 643, 648-49 & n.3 (8th Cir. 1995).

Relatedly, several courts disagree with the Ninth Circuit's Fourth Amendment "provocation" rule. Under that rule, if a police officer properly identifies herself but makes an unlawful entry, the Fourth Amendment prohibits her from using force to defend herself against a later attack, on the theory that she "provoked" it. *See, e.g.*, *Espinosa v. City and County of*

San Francisco, 598 F.3d 528, 538-39 (9th Cir. 2010). Here, the majority held that the officers' unlawful entry would trigger the provocation rule, rendering their otherwise reasonable force in self-defense, unreasonable under the Fourth Amendment. Pet. App. 36-38. Other circuits sensibly reject this "provocation" rule, which treats officers' lives as disposable. *See Hogan v. Cunningham*, 722 F.3d 725, 733 (5th Cir. 2013) (holding officers' force reasonable after plaintiff resisted unlawful entry); *Livermore v. Lubelan*, 476 F.3d 397, 406-07 (6th Cir. 2007) (noting disagreement with Ninth Circuit's rule); *Hector v. Watt*, 235 F.3d 154, 160 (3d Cir. 2001) ("[I]f the officers' use of force was reasonable given the plaintiff's acts, then despite the illegal entry, the plaintiff's own conduct would be an intervening cause that limited the officers' liability."); *Dickerson v. McClellan*, 101 F.3d 1151, 1162 (6th Cir. 1996); *Bodine v. Warwick*, 72 F.3d 393, 400 (3d Cir. 1995) (Alito, J.) ("Is the officer necessarily liable for the harm caused to the suspect on the theory that the illegal entry without knocking and announcing rendered any subsequent use of force unlawful? The obvious answer is 'no.'"). Indeed, criminal decisions reject this "provocation" rule, and treat a suspect's resistance to an *unlawful* detention, arrest, or search, as a *lawful* basis for a Fourth Amendment seizure. *See, e.g.*, *United States v. Sledge*, 460 F.3d 963, 966 (8th Cir. 2006) (collecting cases); *United States v. Sprinkle*, 106 F.3d 613, 619 n.4 (4th Cir. 1997) (collecting cases); *see also United States v. Pryor*, 32 F.3d 1192, 1196 (7th Cir. 1994); *United States v. Waupekenay*, 973 F.2d 1533, 1537 (10th Cir.

1992); *United States v. King*, 724 F.2d 253, 256 (1st Cir. 1984); *United States v. Bailey*, 691 F.2d 1009, 1016-17 (11th Cir. 1982).

The Ninth Circuit's Fourth Amendment rule was not clearly established in 2008, and it is contrary to the great weight of Fourth Amendment authority.

B. California Law Authorized Officers To Persist In Making An Arrest In The Face Of Resistance

Police officers have qualified immunity when they rely on existing state law that authorizes their conduct. *Stanton*, 134 S. Ct. at 7. Contrary to the Ninth Circuit's rule, California law provides that an officer with probable cause to make an arrest "need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested." Cal. Penal Code § 835a.[6] As the State's

---

[6] Indeed, officers have analogous statutory authority in other States – further calling into question the correctness of the Ninth Circuit's Fourth Amendment rule. Thirteen States including California have statutes expressly authorizing officers to press forward to make an arrest in the face of resistance. Cal. Penal Code § 835a; Del. Code Ann. tit. 11, § 464; Fla. Stat. Ann. § 776.05; Haw. Rev. Stat. § 803-7; 720 Ill. Comp. Stat. Ann. 5/7-5; Kan. Stat. Ann. § 21-5227; La. Code Crim. Proc. Ann. art. 220; Mo. Ann. Stat. § 563.046; Neb. Rev. Stat. Ann. § 28-1409(4)(b)(ii); N.J. Stat. Ann. § 2C:3-4(b)(2)(b)(ii); Okla. Stat. Ann. tit. 22, § 193; 18 Pa. Cons. Stat. Ann. § 508; Wash. Rev. Code Ann. § 10.31.050. Sixteen other States' courts have construed their statutes to confer similar authority to press forward in the face of resistance. *Union Indem. Co. v. Webster*, 118 So. 794, 802 (Ala.

(Continued on following page)

highest court explained, "an officer with probable cause to make an arrest is not bound to put off the arrest until a more favorable time and is under no obligation to retire in order to avoid a conflict. Instead, an officer may press forward and make the arrest, using all the force reasonably necessary to accomplish that purpose." *Hernandez v. City of Pomona*, 46 Cal. 4th 501, 518 (2009) (internal quotation marks, brackets, and citations omitted). Given that probable cause existed to arrest Sheehan for her

---

1928); *People v. Toler*, 9 P.3d 341, 350-51 (Colo. 2000); *Klinkel v. Saddler*, 233 N.W. 538, 541 (Iowa 1930); *Connelly v. American Bonding & Trust Co.*, 69 S.W. 959, 961 (Ky. 1902); *People v. Doss*, 276 N.W.2d 9, 14 (Mich. 1979); *State v. Prlja*, 189 P. 64, 66 (Mont. 1920); *State v. Acosta*, 242 P. 316, 318 (Nev. 1926); *State v. Vargas*, 74 P.2d 62, 66 (N.M. 1937); *Myrick v. Cooley*, 371 S.E.2d 492, 496 (N.C. 1988); *State v. Washington*, 737 N.W.2d 382, 389 (N.D. 2007); *Fields v. Dailey*, 587 N.E.2d 400, 406 (Ohio Ct. App. 1990); *State v. Castle*, 616 P.2d 510, 512 (Or. 1980); *Sheppard v. State*, 594 S.E.2d 462, 473 (S.C. 2004); *Morgan v. State*, 262 S.W.2d 713, 714 (Tex. Crim. App. 1953); *Mercer v. Commonwealth*, 142 S.E. 369, 372 (Va. 1928); *State v. Reppert*, 52 S.E.2d 820, 830 (W. Va. 1949); *Krueger v. State*, 177 N.W. 917, 923 (Wis. 1920). The statutes of several other States expressly provide that police may use force to overcome resistance to an arrest and prevent escape. Conn. Gen. Stat. Ann. § 53a-22; Idaho Code Ann. § 19-610; Me. Rev. Stat. tit. 17-A, § 107; Minn. Stat. Ann. § 609.06; N.H. Rev. Stat. Ann. § 627:5; Tenn. Code Ann. § 40-7-108; Utah Code Ann. § 77-7-7; *see also* Ariz. Rev. Stat. Ann. § 13-410 (use of deadly force); Miss. Code Ann. § 97-3-15 (same); Vt. Stat. Ann. tit. 13, § 2305 (same). The statutes and common law of every State recognize that "the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Graham*, 490 U.S. at 396.

threats and for assaulting Reynolds and Holder with a deadly weapon, it cannot be said that only a plainly incompetent officer could conclude that they had lawful authority to persist in arresting her.

C. A Reasonable Officer Could Have Concluded That The Threat Posed By Sheehan Justified Re-Opening Her Door

For the law to be clearly established, it must "be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. Here, even assuming that the Fourth Amendment required a finding of an "immediate need" to enter – beyond the finding of immediate need implicit in a determination that an exception to the warrant requirement applies – it was not clear that this "immediate need" standard was not satisfied here. "It is sometimes difficult for an officer to determine how the relevant legal doctrine will apply to the factual situation the officer confronts." *Id.* at 205. Consequently, qualified immunity would extend to the decision whether an "immediate need" existed on these facts. "The protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'" *Pearson*, 555 U.S. at 231 (quoting *Groh v. Ramirez*, 540 U.S. 551, 567 (2004) (Kennedy, J., dissenting)); *Butz v. Economou*, 438 U.S. 478, 507 (1978). Here, the majority did not give appropriate respect to the assessment of officers on the scene that there was an

"immediate need" to enter, and qualified immunity applies.

1. If there is any room for debate on that question, immunity would apply. But the majority mistakenly treated the possibility of a debate about the risk as a reason to deny summary judgment, rather than grant it. Faced with some undisputed facts from which it could be argued that the officers acted reasonably, and other undisputed facts from which it could be argued that they did not, the Ninth Circuit concluded that this was a factual dispute for the jury – not a legal question for the court. Pet. App. 26-32. That approach is not consistent with this Court's precedents, which hold that arguments about Fourth Amendment reasonableness and qualified immunity are legal disputes for courts to decide. *Plumhoff*, 134 S. Ct. at 2019. Here, the majority confused the "fact-bound" nature of Fourth Amendment arguments with the existence of a factual dispute. *Scott*, 550 U.S. at 383.

2. As a matter of immunity law, this Court's immunity decisions allow significant latitude for officer judgments about possible threats to officer safety or public safety – including whether a public safety emergency justifies an entry. "[J]udges should be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation," when they are "far removed from the scene and with the opportunity to dissect the elements of the situation." *Ryburn v. Huff*, 132 S. Ct. 987, 991-92 (2012) (per curiam). An officer's

assessment that a risk exists on a given set of facts is permissible if "a reasonable officer *could have come to such a conclusion* based on the facts." *Id.* at 992 (emphasis added). That principle applies equally at summary judgment: so long as "a reasonable officer" in the same position "*could have believed*" that his or her response "was *within the bounds* of appropriate police responses," the officer is immune. *Saucier*, 533 U.S. at 208 (emphasis added). And where an officer does "not know the full extent of the threat" posed by an individual, that uncertainty weighs in favor of immunity, not against it. *Id.* A court accepts conclusions about dangerousness that an officer on the scene could make, so long as those conclusions are not so unreasonable that they fall outside the range of judgments that immunity permits. *Id.*; *cf. Brosseau*, 543 U.S. at 200 (at summary judgment, accepting officer's assessment that "persons in the immediate area [were] at risk from the flight"). If the worst that could be said about an officer's decision is that reasonable minds could differ, then immunity applies.

3. Under this law, these officers' risk assessment would have satisfied the majority's "immediate need" standard, because "a reasonable officer *could have come to such a conclusion* based on the facts." *Ryburn*, 132 S. Ct. at 992 (emphasis added). Here, there was a plausible factual and legal basis for the officers to conclude that the need to disarm a violent and irrational person in her home posed a risk justifying immediate action. *See Hayden*, 387 U.S. at 299 (holding exigency existed, where "speed" was "essential"

to ensure "that the police had control of all weapons which could be used against them or to effect an escape"); *cf. Maryland v. Buie*, 494 U.S. 325, 333 (1990) ("An ambush in a confined setting of unknown configuration is more to be feared than it is in open, more familiar surroundings."). Both the dissenting Ninth Circuit judge and the district court judge so found. Pet. App. 49, 71. "[I]t is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson*, 526 U.S. at 618. Qualified immunity applies.

CONCLUSION

This Court should reverse the judgment of the court of appeals as to the ADA claim against the City and County of San Francisco, and the section 1983 claims against Kimberly Reynolds and Kathrine Holder.

Respectfully submitted,

SAN FRANCISCO CITY
ATTORNEY'S OFFICE
DENNIS J. HERRERA
City Attorney
CHRISTINE VAN AKEN
Chief of Appellate Litigation
BLAKE P. LOEBS
PETER J. KEITH, *Counsel of Record*
Deputy City Attorneys

Counsel for Petitioners

APPENDIX

RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

Provisions relevant to the first question presented.

42 U.S.C. § 12131 states in relevant part:

* * *

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12132 states:

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

28 C.F.R. § 35.139 states:

(a) This part does not require a public entity to permit an individual to participate in or benefit from the services, programs, or

activities of that public entity when that individual poses a direct threat to the health or safety of others.

(b) In determining whether an individual poses a direct threat to the health or safety of others, a public entity must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.

28 C.F.R. § 35.104 states in relevant part:

§ 35.104 Definitions

* * *

Direct threat means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services as provided in § 35.139.

* * *

28 C.F.R. § 35.130 states in relevant part:

* * *

(b) * * *

* * *

(7) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

* * *

(h) A public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities. However, the public entity must ensure that its safety requirements are based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities.

Provisions relevant to the second question presented.

The Fourth Amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

California Penal Code § 835a (West 2008) states:

> Any peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to effect the arrest, to prevent escape or to overcome resistance. A peace officer who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance.

RESPONDENT'S BRIEF

Supreme Court, U.S.
FILED
FEB 9 - 2014
OFFICE OF THE CLERK

No. 13-1412

In the Supreme Court of the United States

CITY AND COUNTY OF
SAN FRANCISCO, CALIFORNIA, ET AL.,

Petitioners,

v.

TERESA SHEEHAN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT

BEN NISENBAUM
LAW OFFICES OF JOHN BURRIS
7677 OAKPORT STREET,
SUITE 300
OAKLAND, CA 94261

JILL D. BOWMAN
HUNTER O. FERGUSON
STOEL RIVES LLP
600 UNIVERSITY STREET,
SUITE 3600
SEATTLE, WA 98101

LEONARD J. FELDMAN
Counsel of Record
PETERSON WAMPOLD
ROSATO LUNA KNOPP
1501 4TH AVENUE,
SUITE 2800
SEATTLE, WA 98101
(206) 624-6800
feldman@pwrlk.com

Counsel for Respondent

QUESTIONS PRESENTED

This case arises from the near-fatal police shooting of Teresa Sheehan, a woman who the officers knew was mentally ill and in need of medical treatment. The questions presented are:

1. Whether Petitioners violated the reasonable accommodation requirement of Title II of the Americans with Disabilities Act when police officers forced a violent confrontation with Sheehan without taking her mental illness into account and without any meaningful attempt to employ universally accepted police practices designed to minimize the risk of a violent confrontation with a mentally ill individual.

2. Whether it was clearly established that even if an exception to the warrant requirement applied, an entry into a residence may be unreasonable under the Fourth Amendment where officers force their way into the home of an emotionally disturbed individual with guns drawn, without any meaningful consideration of the individual's mental illness, and without any countervailing need.

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT 2

SUMMARY OF ARGUMENT 10

ARGUMENT 13

I. It Was Not Objectively Reasonable For Police Officers To Forcibly Reopen The Door to Sheehan's Room With Guns Drawn Without Any Meaningful Attempt To Employ Universally Accepted Police Practices Designed To Minimize The Risk Of A Violent Confrontation With A Mentally Ill Individual. 13

II. Petitioners Violated The Reasonable Accommodation Requirement Of Title II Of The ADA When The Police Officers Forced A Violent Confrontation With Sheehan Without Taking Her Mental Illness Into Account. 24

A. The "Direct Threat" Exception To The Reasonable Accommodation Requirement Does Not Apply Here. 26

B. The Proposed Modifications Would Have Eliminated Any Risk Sheehan Posed And Were Reasonable. 37

C. The "Special Circumstances" Test In *US Airways v. Barnett* Does Not Apply Here, And The ADA Cases Cited By Petitioners Are Likewise Inapposite. 45

III. Reynolds And Holder Are Not Entitled To Qualified Immunity Because They Acted Contrary To Clearly Established Circuit Precedent When They Forcibly Reopened The Door To Sheehan's Room With Guns Drawn Without Any Meaningful Consideration Of Her Mental Disability. 51

CONCLUSION 62

APPENDIX

1. Amendment IV of the United States Constitution 1a
2. 42 U.S.C. § 1983 ..... 1a
3. 42 U.S.C. § 12101 ..... 2a
4. 42 U.S.C. § 12131 ..... 3a
5. 42 U.S.C. § 12132 ..... 3a
6. 28 C.F.R. § 35.104 ..... 4a
7. 28 C.F.R. § 35.130 ..... 4a
8. 28 C.F.R. § 35.139 ..... 5a
9. California Welfare & Institutions Code § 5150 (effective to June 26, 2012) 5a
10. California Welfare & Institutions Code § 5008 ..... 6a

TABLE OF AUTHORITIES

Page(s)

Cases

Alexander v. City & Cnty. of San Francisco,
29 F.3d 1355 (9th Cir. 1994) .....passim

Anderson v. Creighton,
483 U.S. 635 (1987)..... 60

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986)..... 17

Ashcroft v. al-Kidd,
131 S. Ct. 2074 (2011)..... 60

Avina v. United States,
681 F.3d 1127 (9th Cir. 2012)..... 15

Baird v. Renbarger,
576 F.3d 340 (7th Cir. 2009) 15

Barber v. Colo. Dep't of Revenue,
562 F.3d 1222 (10th Cir. 2009)..... 44

Billington v. Smith,
292 F.3d 1177 (9th Cir. 2002)..... 58

Binay v. Bettendorf,
601 F.3d 640 (6th Cir. 2010) 15

Bircoll v. Miami-Dade Cnty.,
480 F.3d 1072 (11th Cir. 2007).....35, 50

Blanford v. Sacramento Cnty.,
406 F.3d 1110 (9th Cir. 2005) 59

Bragdon v. Abbott,
524 U.S. 624 (1998) ..... passim

Brigham City v. Stuart,
547 U.S. 398 (2006) 57

Brosseau v. Haugen,
543 U.S. 194 (2004) (*per curiam*) 51

Camara v. Mun. Ct.,
387 U.S. 523 (1967) 16

Champion v. Outlook Nashville, Inc.,
380 F.3d 893 (6th Cir. 2004) 23, 60

City of Indianapolis v. Edmond,
531 U.S. 32 (2000) 17

De Boise v. Taser Int'l, Inc.,
760 F.3d 892 (8th Cir. 2014),
petition for cert. filed (U.S. Jan. 8,
2015) (No. 14-812) 49

Deorle v. Rutherford,
272 F.3d 1272 (9th Cir. 2001) ..... passim

Drummond v. City of Anaheim,
343 F.3d 1052 (9th Cir. 2003) 23, 54, 56, 60

Waller ex rel. Estate of Hunt v. City of Danville,
556 F.3d 171 (4th Cir. 2009) 39, 49

Farmer v. Brennan,
511 U.S. 825 (1994)..... 21

Fisher v. City of San Jose,
558 F.3d 1069 (9th Cir. 2009)..... 59

Gohier v. Enright,
186 F.3d 1216 (10th Cir. 1999)..... 49

Gorman v. Bartch,
152 F.3d 907 (8th Cir. 1998) 25

Graham v. Connor,
490 U.S. 386 (1989).....passim

Gregory v. Cnty. of Maui,
523 F.3d 1103 (9th Cir. 2008)..... 59

Hainze v. Richards,
207 F.3d 795 (5th Cir. 2000) 28, 49

Hope v. Pelzer,
536 U.S. 730 (2002)..... 51

Hudson v. Michigan,
547 U.S. 586 (2006)..... 57

Illinois v. McArthur,
531 U.S. 326 (2001).....14, 16

Bates ex rel. Johns v. Chesterfield Cnty.,
216 F.3d 367 (4th Cir. 2000) 49

Kentucky v. King,
131 S. Ct. 1849 (2011)..... 57

Leveto v. Lapina,
258 F.3d 156 (3d Cir. 2001) 15

Long v. City & Cnty. of Honolulu,
511 F.3d 901 (9th Cir. 2007) 59

Ludwig v. Anderson,
54 F.3d 465 (8th Cir. 1995) 23, 60

Meeks v. Schofield,
10 F. Supp. 3d 774 (M.D. Tenn.
2014)..... 44

Mich. Dep't of State Police v. Sitz,
496 U.S. 444 (1990)..... 17

Michigan v. Tyler,
436 U.S. 499 (1978)..... 19

Mlodzinski v. Lewis,
648 F.3d 24 (1st Cir. 2011) 15

Morais v. City of Philadelphia,
No. 06-582, 2007 WL 853811 (E.D.
Pa. Mar. 19, 2007)..... 30

New Jersey v. T.L.O.,
469 U.S. 325 (1985)..... 17

Holland ex rel. Overdorff v.
Harrington,
268 F.3d 1179 (10th Cir. 2001)..... 15

Pa. Dep't of Corr. v. Yeskey,
524 U.S. 206 (1998).....26, 28

Patrice v. Murphy,
43 F. Supp. 2d 1156 (W.D. Wash. 1999) 25

Payton v. New York,
445 U.S. 573 (1980) 18, 19

PGA Tour, Inc. v. Martin,
532 U.S. 661 (2001) 46

Phillips v. Community Ins. Corp.,
678 F.3d 513 (7th Cir. 2012) 18

Robertson v. Las Animas Cnty. Sheriff's Dep't,
500 F.3d 1185 (10th Cir. 2007) 43

Saucier v. Katz,
533 U.S. 194 (2001) 51

School Bd. of Nassau Cnty. v. Arline,
480 U.S. 273 (1987) 29

Seremeth v. Bd. of Cnty. Comm'rs Frederick Cnty.,
673 F.3d 333 (4th Cir. 2012) 25, 35, 49

Skinner v. Ry. Labor Execs.' Ass'n,
489 U.S. 602 (1989) 17

Smith v. Cnty. of Kern,
25 Cal. Rptr. 2d 716 (Ct. App. 1993) 43

Estate of Smith v. Marasco,
430 F.3d 140 (3d Cir. 2005) 39

Stanton v. Sims,
134 S. Ct. 3 (2013) 60

Tennessee v. Garner,
471 U.S. 1 (1985).....20, 23

Terry v. Ohio,
392 U.S. 1 (1968).....14, 15, 16, 31

Tolan v. Cotton,
134 S. Ct. 1861 (2014) (*per curiam*)
.....18, 51, 52, 61

Tsombanidis v. West Haven Fire Dep't,
352 F.3d 565 (2d Cir. 2003) 44

Tucker v. Tennessee,
539 F.3d 526 (6th Cir. 2008) 50

United States v. Arvizu,
534 U.S. 266 (2002)..... 23

United States v. Knights,
534 U.S. 112 (2001)..... 14

United States v. Ramirez,
523 U.S. 65 (1998)..... 14

United States v. Santana,
427 U.S. 38 (1976)..... 57

US Airways, Inc. v. Barnett,
535 U.S. 391 (2002).....11, 45, 46, 48

Vernonia Sch. Dist. 47J v. Acton,
515 U.S. 646 (1995).....14, 16

Warden v. Hayden,
387 U.S. 294 (1967)..... 57

Weigel v. Broad,
544 F.3d 1143 (10th Cir. 2008)..... 23

Wilson v. Arkansas,
514 U.S. 927 (1995)..... 15

Wilson v. Layne,
526 U.S. 603 (1999).....14, 56; 60

Statutes

42 U.S.C. § 1983..... 8, 24

42 U.S.C. § 12101(b)..... 46

42 U.S.C. § 12101 et seq. .....passim

42 U.S.C. § 12131(1)(A)-(B) 25

42 U.S.C. § 12132..... 25

42 U.S.C. § 12182(b)(3) 29

Cal. Wel. & Inst. Code § 5150..... 3, 43

Regulations

28 C.F.R. § 35.104 .....29, 37

28 C.F.R. § 35.130(h)..... 31

28 C.F.R. § 35.139(a).....27, 29, 47

28 C.F.R. § 35.139(b)..... 37

Constitutional Provisions

U.S. Const. amend. IV .....passim

Other Authorities

136 Cong. Rec. H2599 (May 22, 1990).....28, 29

66 Ops. Cal. Atty. Gen. 142 (1983)..... 18

Bruce J. Winick, *Civil Commitment: A Therapeutic Jurisprudence Model* (2005)..... 43

Gerard R. Murphy, *Managing Persons with Mental Disabilities: A Curriculum Guide for Police Trainers* (1989) 39

James J. Fyfe, *Policing the Emotionally Disturbed*, 28 J. Am. Acad. Psychiatry L. 345 (2000) 39

Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People*, 34 Colum. Hum. Rts. L. Rev. 261 (2003) 34, 38, 39

San Francisco Police Department General Order 8.02 (Aug. 3, 1994), *available at* http://sf-police.org/Modules/ShowDocument.aspx?documentid=14748 .....8, 22, 42

INTRODUCTION

The police officers in this case unnecessarily caused a violent and nearly deadly confrontation with Theresa Sheehan, a mentally ill woman who had only threatened individuals who entered her room without her permission. With guns drawn, Sergeant Kimberly Reynolds and Officer Katherine Holder forcibly opened the door to Sheehan's room and shot her four times in her torso and arm and then, as she was lying on the ground writhing in pain, shot her again in the face. If Reynolds and Holder had made a meaningful attempt to employ universally accepted police practices designed to minimize the risk of a violent confrontation with a mentally ill individual, as law enforcement officers are trained to do, or even if they had complied with their department's policy regarding barricaded suspect incidents, this violent confrontation would have been avoided.

The Court can appropriately discourage discrimination against mentally ill individuals by law enforcement officials in two ways. First, it can adopt a rule—consistent with the plain language and non-discrimination mandate of the Americans with Disabilities Act ("ADA")—requiring police officers to consider and reasonably accommodate the mental disabilities of suspects with whom they interact. Such a rule is particularly appropriate where, as here, the very reason for a police officer's interactions with a mentally ill or emotionally disturbed individual relates specifically to the individual's disability. Second, the Court can continue to require that police officers carry out

searches and seizures in a reasonable manner. When an officer causes a violent and potentially deadly confrontation with a mentally ill person without any meaningful consideration of the individual's mental disability and without a countervailing need, there is no compelling basis to immunize such conduct from Fourth Amendment scrutiny.

STATEMENT

1. Sheehan is a mentally ill woman who suffers from schizoaffective disorder. J.A. 24, 166, 309. At the time of the events at issue in this case, Sheehan was in her mid-50s, had no criminal record, and lived in a group home for persons suffering from mental illness. J.A. 19-20, 309; Dist. Ct. Dkt. 1 (Compl. ¶ 10). She and other residents shared common areas, such as the kitchen, but lived independently in private rooms. J.A. 19-20, 91-92, 406.

Heath Hodge was the social worker who supervised the counseling staff at the home. J.A. 21, 84. On August 7, 2008, Hodge went to Sheehan's room to perform a welfare check. J.A. 22-24. When she did not respond to his knock on her door, he used a key to enter her room. J.A. 91-93. Hodge found Sheehan lying on her bed, staring, with a book resting on her face. J.A. 93-94. She did not initially respond to his questions but, after a while, jumped out of bed and told him to get out of her room. J.A. 94. She also threatened him and told him that she had a knife. *Id.*

Although Hodge did not see a knife, he spoke with the only other persons in the group home at the time—a property manager and another resident—and made sure that everyone had left or would soon leave. J.A. 25, 96. He then filled out an application under California Welfare & Institutions Code § 5150 to involuntarily commit Sheehan so that she would receive any necessary medical treatment. J.A. 26, 89, 98. Hodge checked boxes indicating he believed that Sheehan was a danger to others and was gravely disabled, but did not check the box to indicate that Sheehan was a danger to herself. J.A. 398. Hodge then telephoned the police for assistance in transporting Sheehan to the hospital. J.A. 26, 86, 97-98. He called the non-emergency number because he did not believe there was any imminent risk that Sheehan would harm herself or that she would leave her room to harm anyone else. J.A. 26, 97-98, 111-12.

Officer Holder responded to the call and decided that she needed her sergeant's assistance because she was unsure whether Hodge was authorized to seek a detention. J.A. 32-33, 172-73. She was soon joined by Sergeant Reynolds. J.A. 208. Hodge told Reynolds and Holder that Sheehan had schizophrenia and had been off her medication for about a year and a half, that she was not taking care of herself, and that she had threatened to stab him when he went into her room. J.A. 34, 166, 169, 208-09. He showed them his completed Section 5150 application and told them there was no one else in the building. J.A. 47, 99, 101, 114. Hodge had not checked the box on the application that would have indicated that Sheehan was a danger to

herself, and nothing else he said to the officers suggested that she was suicidal or a danger to herself. J.A. 113, 168, 211, 398.

Reynolds believed it was her responsibility to assess Sheehan herself to confirm that the detention criteria were met. J.A. 34, 210-11. Accompanied by Holder and Hodge, Reynolds climbed the steps to the front door and another flight of stairs to the second floor and walked down the hall to Sheehan's room. J.A. 34-35, 102, 173, 215, 400. The officers knocked on the closed door and told Sheehan that they were there to help her. J.A. 27, 217. Using Hodge's key, the officers opened the door. J.A. 28, 104, 212-13.

When the door opened, Sheehan rose from her bed, grabbed a small bread knife she had purchased at a supermarket, and started walking toward the officers. J.A. 60, 105, 178, 181-82, 221-23, 272. Hodge testified that Sheehan was not making stabbing motions with the knife and that she did not appear to be trying to stab the officers. J.A. 118. Holder similarly testified: "I don't remember her making jabbing motions or anything." J.A. 181. Sheehan told the officers she did not need their help and to leave her alone, threatened them verbally, and yelled at them to get out of her room. J.A. 177-78, 223, 283. According to Sheehan, while the door was open the officers "could see ... that no one else was in the room with me." J.A. 279.

The officers drew their guns and retreated, and Sheehan shut the door. J.A. 37-39, 217-18,

226, 231. At that point, according to Hodge, Sheehan did not appear to be a further threat to the officers. J.A. 118-19. Out in the hallway, the officers asked Hodge whether they could get into Sheehan's room from the back. J.A. 116. Hodge informed them that other than the door to the hall, where the officers were standing, the only way into Sheehan's second-floor room was through a window. *Id.*

The officers called for backup, reporting there was a barricaded suspect with a knife and asking that additional officers cover the rear of the building. J.A. 14, 40, 184-85, 197. Backup arrived quickly: Reynolds testified she was "shocked at how quick the sirens were right there and it was fast, and the response time was very quick." J.A. 41. When Reynolds heard the sirens, she sent Hodge to the front door to let the other officers in. J.A. 29, 41, 107-09, 236.

According to the Computer-Aided Dispatch printout, Officer James Escobar arrived at the scene and was directed to the back of the building less than a minute after Holder called for backup. J.A. 407. At the same time, Officer Constantine Zachos was running up the front steps of the building. J.A. 130. Two additional officers—Officer E.R. Balinton and Sergeant Mitchell Campbell—also arrived on the scene. J.A. 324. Reynolds and Holder did not wait for Zachos or anyone else. Instead, even though backup officers had both the back and the front of the building covered, Reynolds and Holder, with guns drawn, forced open the door to Sheehan's room, where they knew they

would find a mentally ill woman confronting them with a knife. J.A. 12-13, 40-41, 50-51, 60-61, 232, 235.

As soon as the officers forced the door open, Sheehan stepped forward holding her bread knife and told the officers "to go away. Leave me alone." J.A. 278-80, 283. Reynolds responded by shooting pepper spray into Sheehan's face. J.A. 238, 280. Sheehan screamed that the officers were blinding her and she could not see. J.A. 280. Reynolds and Holder then shot Sheehan four times. J.A. 44, 287-88, 292. With wounds in her torso and right arm, Sheehan fell to the ground but the officers' attack continued. J.A. 15-16, 82, 253-54, 280-81, 292. According to Holder's statement on the day of the shooting and Sheehan's forensic science expert, Reynolds shot Sheehan in the face *after* she was lying on the ground. J.A. 15-16, 67-68, 293. Sheehan was on the floor screaming in pain when Zachos ran up and kicked the knife out of her hand. J.A. 131, 154, 254, 281-82.

Reynolds testified that she did *not* consider Sheehan's "psychiatric disability" when she instructed Holder to forcibly open the door to Sheehan's room. J.A. 266. Instead, according to Reynolds, "[a]t this point in my mind the disability, the mental illness, however you'd like to refer to it, became a secondary issue. And what I was faced with was a violent woman who had already threatened to kill her social worker." J.A. 235.

The officers' failure to take Sheehan's mental disability into account—and to enter her room

without any meaningful attempt to employ universally accepted police practices designed to minimize the risk of a violent confrontation with a mentally ill individual—was in violation of their training for dealing with emotionally disturbed individuals. As detailed in the report and testimony of Lou Reiter, a former deputy chief of police in Los Angeles and consultant to police departments across the country and the Department of Justice, SFPD training materials instruct officers to (a) coordinate their approach and ensure that sufficient resources are brought to the scene, (b) contain the subject and respect the comfort zone of the subject, (c) use time to their advantage because the longer an encounter is allowed to occur, the better the chance of a successful and safe resolution, and (d) employ non-threatening verbal communication and open-ended questions to facilitate the subject's participation in communication. J.A. 301-58. These instructions are set forth in various SFPD training materials, cited by Reiter,[1] and other training materials and writers on police procedure agree with these instructions. *See infra* at 38-39.

Although they had been told that Sheehan was acting irrationally because of a mental disability, Reynolds and Holder concluded that Sheehan was a

---

[1] *See* J.A. 305-06, 311-14 (citing chapter of Learning Domain 37 on Mental Illness, the training session "Communications Techniques and Non-Violent Crisis Intervention," and the SFPD Roll Call Training Lesson "Psychological Evaluation of Adults Part 1-3").

violent criminal and decided to forcibly reenter her room to arrest her. J.A. 12-13, 174-75, 227. In doing so, they violated SFPD's policy regarding "barricaded suspect incidents," which states:

> In the event that a suspect resists arrest by barricading himself, and normal police procedures fail to bring about his arrest, it is the policy of the San Francisco Police Department to use hostage negotiators to attempt a negotiated surrender.

San Francisco Police Department General Order 8.02, at II.B (Aug. 3, 1994), *available at* http://sf-police.org/Modules/ShowDocument.aspx?documentid=14748; *see also* J.A. 321 (summarizing policy). The same policy also requires officers to establish a perimeter around the location, identify a command post, and notify "Communications Division" of the situation. *Id.* at III.A; J.A. 321. Reynolds and Holder did not do any of these things.

The shooting left Sheehan permanently disabled. Dist. Ct. Dkt. 1 (Compl. ¶ 26). Sheehan was then prosecuted for assault with a deadly weapon and making criminal threats. *Id.* (Compl. ¶ 27). The jury hung on the assault counts and acquitted her on the criminal threat count. *Id.* The city did not retry her. Dist. Ct. Dkt. 48-8 (Superior Ct. of Cal., County of San Francisco Minutes, p. 7).

2. Sheehan filed suit against Petitioners alleging, in relevant part, a Section 1983 claim

against Reynolds and Holder based on the officers' violation of her Fourth Amendment rights and an ADA claim against the City and County of San Francisco based on Petitioners' violation of the statute's reasonable accommodation requirement. Dist. Ct. Dkt. 1 (Compl.). Petitioners filed a motion for summary judgment on all of Sheehan's claims. Dist. Ct. Dkt. 37. In response, Sheehan submitted Reiter's expert witness report disputing the reasonableness of the officers' actions. J.A. 301-58. In addition to describing general police practices for dealing with persons who are mentally ill or emotionally disturbed (*see supra* at 7), Reiter opined that the officers' second entry into Sheehan's room was contrary to reasonable and generally accepted police practices. J.A. 309-21, 325-26. Despite that detailed report, the district court granted summary judgment to Petitioners. Pet. App. 55-81.

3. The court of appeals affirmed the judgment in part and vacated it in part in a divided opinion. Pet. App. 1-48. Relevant here, the court (Judges John Noonan and Raymond Fisher in the panel majority) found triable issues of fact as to whether the officers' second entry into Sheehan's room violated the Fourth Amendment "when they decided to force the second entry, without taking Sheehan's mental illness into account and in an apparent departure from their police officer training." Pet. App. 26. The court likewise held that fact issues precluded summary judgment regarding Petitioners' qualified immunity defense. Pet. App. 36.

The court also rejected Petitioners' arguments regarding Sheehan's ADA claim. It first held—consistent with other circuits—that the reasonable accommodation requirement of Title II of the ADA applies to law enforcement activities, including arrests. Pet. App. 43. It then held that Petitioners were not entitled to summary judgment on the ADA claim because "[a] reasonable jury ... could find that the situation had been defused sufficiently, following the initial retreat from Sheehan's room, to afford the officers an opportunity to wait for backup and to employ less confrontational tactics, including the accommodations that Sheehan asserts were necessary." Pet. App. 45.

Judge Susan Graber dissented from the qualified immunity ruling, but concurred with the remainder of the opinion. Pet. App. 48-54.

SUMMARY OF ARGUMENT

I. There are, at the very least, fact issues regarding whether Petitioners violated the reasonable accommodation requirement of Title II of the ADA when Reynolds and Holder forced a violent confrontation with Sheehan without taking her mental illness into account.

A. Disavowing any categorical rule that the ADA does not apply to arrests (contrary to their original argument in their petition for a writ of certiorari), Petitioners' lead argument regarding Sheehan's ADA claim is that Sheehan is not a "qualified individual with a disability" under Title II of the ADA because she allegedly posed a "direct

threat" to the safety of others. Legally, it makes no sense to apply this exception to Title II's reasonable accommodation requirement where, as here, an individual's mental illness is the reason for a police officer's interaction with that person. Factually, Petitioners cannot satisfy the direct threat exception because (a) the officers and Hodge were protected by the door and no one else was in the building, (b) Sheehan was not a flight risk, and (c) throughout the encounter, Sheehan had only threatened individuals who had entered her room without her permission. For these reasons and others, the record, viewed favorably to Sheehan, shows that Sheehan did not present a direct threat to others.

B. Even if Petitioners could show that Sheehan presented a direct threat to others, they also must establish, as a matter of law, that the proposed modifications would not have eliminated any threat and were not reasonable. Far from being unreasonable, the proposed modifications are consistent with applicable training materials and universally accepted police practices designed to minimize the risk of a violent confrontation with a mentally ill individual. Had the officers reasonably accommodated Sheehan's disability using these established police practices, they could have eliminated any risk that Sheehan posed to others and avoided a violent confrontation.

C. On the facts presented, there is no basis to adopt a "special circumstances" test in Title II cases as the United States suggests. Unlike the circumstances in *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002)—the case cited by the United

States in support of this argument—there is no substantial conflict between the proposed modifications and prescribed police practices that would warrant such a test. As a result, courts can continue to apply established Title II principles as set forth in points A and B above. Applying those principles here, the court of appeals correctly concluded that Sheehan's ADA claim cannot be dismissed as a matter of law.

II. Nor are Reynolds and Holder entitled to qualified immunity. The officers violated Sheehan's Fourth Amendment rights when, contrary to their training, SFPD's barricaded suspect policy, and universally accepted police practices, they forcibly reopened the door to Sheehan's room with guns drawn and shot her five times (a) without taking her mental illness into account and (b) without a countervailing need. The officers' conduct was not objectively reasonable, and Sheehan's constitutional rights in this regard are clearly established, at the appropriate level of specificity, by the three principal cases that the court of appeals cited in support of its holding: *Graham v. Connor*, 490 U.S. 386 (1989); *Alexander v. City & Cnty. of San Francisco*, 29 F.3d 1355 (9th Cir. 1994); and *Deorle v. Rutherford*, 272 F.3d 1272 (9th Cir. 2001). As the court of appeals correctly held, the officers' conduct should not be immunized from Fourth Amendment scrutiny.

ARGUMENT

I. It Was Not Objectively Reasonable For Police Officers To Forcibly Reopen The Door to Sheehan's Room With Guns Drawn Without Any Meaningful Attempt To Employ Universally Accepted Police Practices Designed To Minimize The Risk Of A Violent Confrontation With A Mentally Ill Individual.

Focusing on the officers' decision to forcibly reopen the door to her room with guns drawn, Sheehan asserts that even if the officers could lawfully enter her residence they violated her Fourth Amendment rights when they failed to carry out the search or seizure in a reasonable manner. The court of appeals ruled in favor of Sheehan on this claim: it found issues of fact, vacated the district court's summary judgment ruling in Petitioners' favor, and remanded the matter for trial. Pet. App. 25-32.

The reasonableness of the officers' actions is a significant threshold issue in this case for two reasons. First, as Petitioners have acknowledged, reasonableness is a central element of both the accommodation requirement of Title II of the ADA and the Fourth Amendment's limitations on searches and seizures. Pet. Br. 25. Second, the qualified immunity issue also turns on the reasonableness of the officers' actions. The reasonableness of the officers' actions is therefore addressed first below.

A. As Petitioners acknowledge in both their ADA discussion (Pet. Br. 25) and their qualified immunity discussion (Pet. Br. 45), the Fourth Amendment requires that searches be reasonable in their execution. Addressing that issue, the Court has emphasized that "[t]he touchstone of the Fourth Amendment is reasonableness ...." *United States v. Knights*, 534 U.S. 112, 118 (2001); *see also Illinois v. McArthur*, 531 U.S. 326, 330 (2001) ("central requirement" of Fourth Amendment "is one of reasonableness" (internal quotation marks and citation omitted)); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995) ("As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is 'reasonableness.'").

Searches and seizures may be challenged as unreasonable in their execution whether or not they are conducted pursuant to a warrant, permitted by an exception to the warrant requirement, or justified at their inception by probable cause or reasonable suspicion. The Court recognized that legal principle in *Terry v. Ohio*, 392 U.S. 1, 28 (1968): "The manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all." Based on this well-established and repeatedly confirmed legal principle,[2] lower

---

[2] *See, e.g., Wilson v. Layne*, 526 U.S. 603, 614 (1999) (allowing media observers into a residence during execution of a warrant was unreasonable); *United States v. Ramirez*, 523 U.S. 65, 71 (1998) ("The general touchstone of reasonableness which governs Fourth Amendment analysis governs the

(continued . . .)

courts have entertained numerous claims based on searches or seizures that were unreasonable in their execution.[3]

The Court explained in *Terry* that "to assess ... reasonableness ... as a general proposition, it is necessary 'first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the

---

(. . . continued)
method of execution of the warrant. Excessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is lawful...." (citation omitted)); *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995) ("[W]e have little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure.").

[3] *See, e.g., Avina v. United States*, 681 F.3d 1127, 1132-33 (9th Cir. 2012) (forcing children to lie on ground with hands cuffed behind backs during drug search); *Mlodzinski v. Lewis*, 648 F.3d 24, 37-39 (1st Cir. 2011) (shoving 15-year-old girl to floor and detaining her with assault rifle to her head longer than necessary to secure premises; pointing assault rifle at head of suspect's mother for half an hour while she was handcuffed and lying partially nude in bed); *Binay v. Bettendorf*, 601 F.3d 640, 648-50 (6th Cir. 2010) (holding plaintiffs at gunpoint and handcuffed during and after drug search); *Baird v. Renbarger*, 576 F.3d 340, 344-45 (7th Cir. 2009) (using 9 mm submachine gun to detain persons present at site of search for evidence regarding crime of altering a vehicle identification number); *Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179, 1188, 1192-94 (10th Cir. 2001) (holding children at gunpoint and using expletives during search); *Leveto v. Lapina*, 258 F.3d 156, 165-66, 171-72 (3d Cir. 2001) (improperly patting plaintiffs down and detaining them for eight hours).

private citizen,' for there is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.'" *Id.* at 20-21 (brackets in original) (quoting *Camara v. Mun. Ct.*, 387 U.S. 523, 534-35, 536-37 (1967)). In *Vernonia*, the Court similarly explained that "whether a particular search meets the reasonableness standard is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." 515 U.S. at 652-53 (internal quotation marks and citations omitted).

The Court applied this balancing test to an excessive force claim in *Graham* and held that "[d]etermining whether the force used to effect a particular seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." 490 U.S. at 396 (internal quotation marks and citations omitted). The Court also explained that the test is an "objective one: the question is whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them." *Id.* at 397 (internal quotation marks omitted).

Of paramount importance here, the Court also has repeatedly considered the "efficacy" of the government's conduct in assessing the "nature and immediacy of the governmental concern at issue." *Vernonia*, 515 U.S. at 660; *see also McArthur*, 531

U.S. at 331 (where search without a warrant is justified by exigent circumstances it must be "tailored to th[e] need" that created the exigency); *City of Indianapolis v. Edmond*, 531 U.S. 32, 47 (2000) ("constitutionality of ... checkpoint programs ... depends on a balancing of the competing interests at stake and the effectiveness of the program"); *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 629-32 (1989) (assessing effectiveness of blood and urine tests of railroad employees); *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985) (courts consider whether "the measures adopted are reasonably related to the objectives of the search"). While this does not require the government to choose the most effective means to achieve its goal, it does require officers to choose from among "reasonable alternative law enforcement techniques." *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 453 (1990).

B. There is ample evidence to support Sheehan's claim that when Reynolds and Holder forcibly reopened the door to her room with guns drawn and without any meaningful attempt to employ universally accepted police practices designed to minimize the risk of a violent confrontation with a mentally ill individual, they violated her Fourth Amendment rights by failing to carry out their search and seizure in a reasonable manner. That is especially so when the evidence is viewed in the light most favorable to Sheehan as required by this Court's precedent. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his

favor"); *see also Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (*per curiam*) ("Our qualified-immunity cases illustrate the importance of drawing inferences in favor of the nonmovant, even when, as here, a court decides only the clearly-established prong of the standard.").

1. Starting with the governmental interest at issue, Hodge asked the police for assistance in transporting Sheehan to a hospital for psychiatric evaluation and treatment. *See* 66 Ops. Cal. Atty. Gen. 142 (1983) (Section 5150 imposes a duty on a police officer to transport a gravely disabled person to a mental health facility). Accordingly, at the outset, the governmental interest was to provide *safe transport*. That is hardly the sort of governmental interest that would justify a violent intrusion of constitutional rights. Moreover, as discussed below (*infra* at 21-22, 30-32), there was no compelling need to immediately take Sheehan into custody. And even if there were, "[a] desire to resolve quickly a potentially dangerous situation is not the type of governmental interest that, standing alone, justifies the use of force that may cause serious injury." *Deorle*, 272 F.3d at 1281; *accord Phillips v. Community Ins. Corp.*, 678 F.3d 513, 525 (7th Cir. 2012) (quoting *Deorle*).

2. The officers' intrusion on Sheehan's Fourth Amendment rights was profound. In *Payton v. New York*, 445 U.S. 573 (1980), the Court recognized that the Fourth Amendment "unequivocally establishes the proposition that 'at the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from

unreasonable governmental intrusion.'" *Id.* at 589-90 (alterations and citation omitted). The officers here decided to force their way into "the unambiguous physical dimensions" of Sheehan's room. *Id.* at 589. Making matters worse, they did so without a warrant,[4] without warning, and with guns drawn—conditions that, as the court of appeals noted, "were likely to result in [Sheehan's] death." Pet. App. 33.

The officers then pepper sprayed and shot Sheehan five times. As Petitioners admit, Sheehan had fallen and "was on the ground" when Reynolds fired her final shot. Pet. Br. 10. Even if it were necessary and objectively reasonable to shoot Sheehan after having just incapacitated her with pepper spray, it was neither reasonable nor

---

[4] Although the Court need not reach the issue, no exception to the warrant requirement applied to the second entry. The emergency aid exception did not apply because the officers did not enter to provide aid. Instead, as Reynolds testified, "[a]t this point in my mind the disability ... became a secondary issue. And what I was faced with was a violent woman who had already threatened to kill her social worker." J.A. 235. Because the officers were at that point focused on arresting rather than helping Sheehan, the continuous entry exception also did not apply. *See Michigan v. Tyler*, 436 U.S. 499, 512 (1978) (continuous entry exception ceases to apply when "investigating officials find probable cause to believe that arson has occurred and require further access to gather evidence for a possible prosecution"). Lastly, because there was no imminent threat (*see infra* at 30-32), the exigent circumstances exception also did not apply. But even if one of these legal theories justified the second entry, it nonetheless violated the Fourth Amendment because it was not reasonable.

necessary to shoot her in the face after she fell to the floor. By any measure, the officers' intrusion on Sheehan's Fourth Amendment rights was immense. *See Tennessee v. Garner*, 471 U.S. 1, 9 (1985) ("The intrusiveness of a seizure by means of deadly force is unmatched.").

3. The severity of Sheehan's alleged crime did not justify such an intrusion. Although threatening another person with a knife can be considered a serious crime, Sheehan threatened Reynolds and Holder because she "was mentally ill and acting in an irrational manner" after the officers indicated they were going to enter her room without her permission. J.A. 321. When asked at her deposition why she did not drop the knife, Sheehan testified: "Because I have the right to bear arms." J.A. 283. She further explained: "I was emotionally upset. I saw the guns and I saw there was two against one and I knew this was just a bread cutting knife. I knew it wasn't a lethal weapon." J.A. 284.

Reynolds and Holder knew that Sheehan was a person of diminished capacity and her conduct was not purposeful. Hodge informed the officers that Sheehan had not been taking her psychotropic medications and was presenting with increased symptoms. J.A. 101, 397-98. SFPD training materials describe the sorts of behaviors associated with mental illness, including "fearfulness," "excitability," "inflexibility," "direct threats," and "begging to be left alone." J.A. 313. Courts, too, have recognized that threats and increasing use of force against an emotionally distraught individual,

which is how Sheehan would have perceived the officers' actions, can "exacerbate the situation." *Deorle*, 272 F.3d at 1283. A reasonable officer on the scene would have known that Sheehan's conduct was a symptom of her illness. *See Farmer v. Brennan*, 511 U.S. 825, 842 (1994) ("[A] factfinder may conclude that a [defendant] knew of a substantial risk from the very fact that the risk was obvious.").

Even ignoring Sheehan's mental disability, Hodge testified that Sheehan did not make stabbing motions with the knife and did not appear to be trying to stab the officers. J.A. 118. Holder likewise testified that she did not "remember [Sheehan] making jabbing motions or anything." J.A. 181. Under the circumstances here, Sheehan's alleged crime did not warrant the immediate use of deadly force. And while Sheehan was prosecuted on several counts, the jury acquitted or hung and the City did not retry her. *See supra* at 8.

4. Nor did Sheehan pose a direct threat to the safety of others. Viewing the facts in the light most favorable to Sheehan, the record shows that (a) Sheehan did not present a danger to anyone in the group home because the officers and Hodge were protected by the door and no one else was in the building, (b) Sheehan was in her room and did not want to leave, (c) even if Sheehan had wanted to leave her room (and she gave no indication of any such desire), the officers were outside her door and the only other way out of her room was through a second-story window, (d) the less-than-lethal-force unit had arrived and could quickly establish a perimeter around the location, and

(e) throughout the encounter, Sheehan had only threatened individuals who had entered her room without her permission. *See supra* at 2-6. Although Petitioners take issue with this assessment, they rely on speculation, contradict the considered views of other professionals, and ignore the rule that the evidence must be viewed in the light most favorable to Sheehan. *See infra* at 30-32.

5. The officers' conduct also was unreasonable because the means by which the search or seizure was conducted was not reasonably likely to achieve the governmental interests pursued. As noted previously, even when a search is justified by exigent circumstances, it must be efficacious, "tailored to the need" that created the exigency, and consistent with "reasonable alternative law enforcement techniques." *See supra* at 16-17. Far from being reasonable law enforcement techniques, the officers' actions were directly contrary to applicable training materials and SFPD's barricaded suspect policy. As Reiter explained, San Francisco police officers are trained not to unreasonably agitate or excite a mentally disabled individual, to contain the person, to respect the person's comfort zone, to use non-threatening communications, and to employ the passage of time to their advantage. J.A. 311-13. SFPD's barricaded suspect policy similarly requires officers to "use hostage negotiators to attempt a negotiated surrender." *See* General Order 8.02, at II.A-B (discussed *supra* at 8).

These materials are directly relevant to Sheehan's claims. In *Garner*, 471 U.S. at 18, the Court relied on similar policy statements in deciding an excessive force claim, and in *United States v. Arvizu*, 534 U.S. 266, 273 (2002), the Court held that "specialized training" of border patrol agents can be considered in determining whether a detaining officer has a "particularized and objective basis" for suspecting legal wrongdoing. Lower courts have likewise recognized that such "training materials are relevant not only to whether the force employed in [a given] case was objectively unreasonable ... but also to whether reasonable officers would have been on notice that the force employed was objectively unreasonable." *Drummond v. City of Anaheim*, 343 F.3d 1052, 1062 (9th Cir. 2003) (emphasis omitted).[5] Reynolds and Holder did not act in accordance with their training or SFPD's barricaded suspect policy. Instead, as the court of appeals concluded, the officers decided to "force the second entry, without taking Sheehan's mental illness into account and in an apparent departure from their police officer training," and "cause a violent—and potentially deadly—confrontation with a mentally ill person without a countervailing need." Pet. App. 26, 31. Even if an exception to the warrant requirement

---

[5] *See also Weigel v. Broad*, 544 F.3d 1143, 1152 (10th Cir. 2008) (law enforcement training materials considered in excessive force analysis); *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 903-04 (6th Cir. 2004) (same); *Ludwig v. Anderson*, 54 F.3d 465, 472 (8th Cir. 1995) (police department guidelines are "relevant to the analysis of constitutionally excessive force").

applied to the second entry, the officers' conduct was manifestly unreasonable.

II. Petitioners Violated The Reasonable Accommodation Requirement Of Title II Of The ADA When The Police Officers Forced A Violent Confrontation With Sheehan Without Taking Her Mental Illness Into Account.

In addition to asserting a Section 1983 claim against Reynolds and Holder, Sheehan asserted an ADA claim against the City and County of San Francisco based on Petitioners' violation of the statute's reasonable accommodation requirement. Dist. Ct. Dkt. 1 (Compl.). Addressing this issue, the court of appeals first held—consistent with other circuits that have addressed the issue—that the "reasonable accommodation" requirement of Title II of the ADA applies to law enforcement activities, including arrests. Pet. App. 43. It then vacated the district court's summary judgment ruling in Petitioners' favor and remanded the claim because "[a] reasonable jury ... could find that the situation had been defused sufficiently, following the initial retreat from Sheehan's room, to afford the officers an opportunity to wait for backup and to employ less confrontational tactics, including the accommodations that Sheehan asserts were necessary." Pet. App. 45.

Petitioners asked the Court to review the court of appeals' ADA ruling because, according to their petition, the court "adopted a rule in direct conflict with the categorical prohibition on such claims

adopted by" other circuits. Pet. 18. Now that review has been granted, Petitioners "do not assert that the actions of individual police officers are never subject to scrutiny under Title II," and they further represent that "[t]here is no claim that an arrest is not one of the 'services, programs, or activities' of a public entity under 42 U.S.C. § 12132." Pet. Br. 34. As a result, it may be appropriate to dismiss Petitioners' first Question Presented as improvidently granted. That aside, Petitioners' decision to disavow a categorical rule that the ADA does not apply to arrests comports with the plain language of the ADA, Title II's legislative history, the Justice Department's implementing regulations, and applicable case law—all of which establish that all operations of a police department, including arrests, are subject to Title II of the ADA.[6] That result also is consistent with this Court's holding that activities in state

---

[6] *See* 42 U.S.C. § 12132 ("no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, *programs, or activities* of a public entity, *or be subjected to discrimination by any such entity*" (emphasis added)); 42 U.S.C. § 12131(1)(A)-(B) (defining "public entity" to include "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government"); *Seremeth v. Bd. of Cnty. Comm'rs Frederick Cnty.*, 673 F.3d 333, 337-40 (4th Cir. 2012) (discussing plain language of ADA, implementing regulations, and case law); *Gorman v. Bartch*, 152 F.3d 907, 911-13 (8th Cir. 1998) (discussing plain language of ADA, implementing regulations, and case law); *Patrice v. Murphy*, 43 F. Supp. 2d 1156, 1158-59 (W.D. Wash. 1999) (discussing plain language of ADA, legislative history, and case law).

prisons are governed by the ADA. *See Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 210-11 (1998). The United States, too, correctly argues that Title II "applies to all governmental entities, including law enforcement activities" and "requires law enforcement entities to make reasonable modifications when arresting an individual with a disability." U.S. Br. 10, 14. Petitioners' supporting amici do not seriously argue otherwise.

Rather than assert that the ADA does not apply to arrests, Petitioners argue that Sheehan's ADA claim fails for two reasons: (1) Sheehan was not a "qualified individual with a disability" because she allegedly posed a direct threat to the safety of others (Pet. Br. 20-33); and (2) the modifications proposed by Sheehan would not have eliminated the significant risk she posed and were not reasonable (Pet. Br. 34-41). The United States, in contrast, claims that the Court should adopt a "special circumstances" test and remand for application of that test. U.S. Br. 17-22. As set forth below, these arguments fail.

A. The "Direct Threat" Exception To The Reasonable Accommodation Requirement Does Not Apply Here.

Petitioners' direct threat argument is based on the ADA's so-called "safety principle." Pet. Br. 22. As Petitioners note, Congress expressly incorporated this principle into the Rehabilitation Act and into both Title I and Title III of the ADA. *Id.* (citing *Bragdon v. Abbott*, 524 U.S. 624, 649-50 (1998) (citing Title I and Title III provisions)).

Although Congress *did not* expressly incorporate this principle into Title II of the ADA, the Justice Department's implementing regulations provide that Title II "does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others." 28 C.F.R. § 35.139(a). This regulation is the lynchpin of Petitioners' public safety argument. Pet. Br. 22. But the direct threat exception to the reasonable accommodation requirement does not apply here, legally or factually.

1. Legally, it makes no sense to apply the direct threat exception when an individual's mental illness or emotional state is the reason for a police officer's interaction with that person. This is not a case where a disabled individual wanted to ride a city bus or attend a public meeting for reasons unrelated to the individual's disability and was told she could not do so based on the direct threat exception to the ADA. To the contrary, the service, program, or activity was *involuntary* and the *very reason* for providing the service relates *specifically* to the individual's disability. *See* Pet. Br. 38 n.5 ("All fifty States have statutes authorizing police officers to take into custody mentally ill individuals who are a danger to themselves or others."). It makes no sense to provide this service to mentally disabled individuals *because they are disabled* but then conclude that the same illness that causes them to be disabled—whether dementia, Alzheimer's, epilepsy, schizophrenia, autism, depression, diabetic hypoglycemia, or any other

illness that can sometimes cause erratic, irrational, or seemingly uncooperative behavior—also triggers an exception to the ADA's non-discrimination mandate.

Petitioners' contrary argument lacks merit. Quoting the Fifth Circuit's opinion in *Hainze v. Richards*, 207 F.3d 795 (5th Cir. 2000), Petitioners claim that Congress could not have intended that the non-discrimination mandate of the ADA would "be attained at the expense of the safety of the general public." Pet. Br. 30 (internal quotation marks and citation omitted). But unlike in Title I and Title III, Congress did not include a public safety exception in Title II of the ADA. The regulations do that. *See supra* at 26-27. And because Title II unambiguously covers all instrumentalities of state or local government *without* any exception that could cast the coverage of arrests into doubt, the congressional purpose identified by Petitioners—expressed nowhere in the statute or legislative history—is "irrelevant." *Yeskey*, 524 U.S. at 212.

If the Court considers the statute's legislative history, it shows that Congress expressly intended to make unlawful the discriminatory treatment of persons with disabilities by law enforcement officials. During legislative debate, Congressman Mel Levine stated: "Regretfully, it is not rare for persons with disabilities to be mistreated by police." 136 Cong. Rec. H2599, H2633 (May 22, 1990). He then cited examples of mistreatment of persons with cerebral palsy, epilepsy, and hearing loss by law enforcement officials and concluded

that, even when conducted in good faith, "[t]hey constitute discrimination, as surely as forbidding entrance to a store or restaurant is discrimination." *Id.*

For all these reasons, the Court should hold that the direct threat exception to the reasonable accommodation requirement does not apply where, as here, the very reason for a police officer's interaction with a mentally ill or emotionally disturbed individual relates specifically to the individual's disability. As discussed below (*infra* at 35), the "reasonableness" requirement appropriately recognizes the concerns of law enforcement officers in such circumstances without unnecessarily abandoning the rights of disabled individuals and the non-discrimination purpose of the ADA.

2. Even if the public risk exception *could* apply here, Petitioners must still show, *factually*, that Sheehan posed "a direct threat to the health or safety of others." 28 C.F.R. § 35.139(a). To defeat Sheehan's ADA claim on this basis, Petitioners must do more than demonstrate that a threat existed: "Because few, if any, activities in life are risk free, *Arline* and the ADA do not ask whether a risk exists, but whether it is significant." *Bragdon*, 524 U.S. at 649 (citing *School Bd. of Nassau Cnty. v. Arline*, 480 U.S. 273, 287 & n.16 (1987), and 42 U.S.C. § 12182(b)(3)); *see also* 28 C.F.R. § 35.104 (defining "direct threat" as "a *significant risk* to the health or safety of others" (emphasis added)).

As discussed above with regard to the reasonableness inquiry (*supra* at 21-22), the record shows that Sheehan did not pose a significant threat to the safety of others. Addressing this issue, Petitioners emphasize that Sheehan had acted in a threatening manner and there were "other knives" in her room. Pet. Br. 29. But throughout the encounter, Sheehan had repeatedly demanded to be left alone and had only threatened individuals who had entered her room without her permission. There was no reason to believe that she had any desire to attack the officers or anyone else outside her room. Further, the bread knife was not a viable threat after the officers retreated and the door to the room was closed. J.A. 118-19.[7]

In arguing that a threat remained, Petitioners resort to speculation and conjecture. Petitioners claim, for example, that even though "Hodge had told the officers that the only other way out of Sheehan's room was her back window" and "[t]he officers knew Sheehan's flat was on the second floor" (Pet. Br. 7), the officers "didn't know" if the

---

[7] Holder attempted to deflect this point by testifying that the knife could stab her through the door (J.A. 189), but as the court of appeals correctly noted: "Arguably, the officers could have avoided harm to themselves by retreating a safe distance from the door." Pet. App. 25 n.8. Common sense confirms that observation, and other courts have recognized the same point. *See, e.g., Morais v. City of Philadelphia*, No. 06-582, 2007 WL 853811, at *5 (E.D. Pa. Mar. 19, 2007) ("Although Decedent was armed with a knife, he did not have the ability to harm any individual outside of his apartment ....").

backyard was graded up to the window (*id.*), "did not ask" for details about the window (*id.*), "could not see" what Sheehan was doing (Pet. Br. 8), "did not know" whether Sheehan was the only person in the room (*id.*), and were concerned about what Sheehan "could be" doing, including "gathering up ... weapons the officer hadn't seen" (Pet. Br. 8, 29). These post hoc rationalizations based on what Sheehan "could be" doing and what the officers "didn't know" are the exact opposite of the *objective evidence* required to establish a significant threat under the ADA. *See Bragdon*, 524 U.S. at 649 ("risk assessment must be based on medical or other *objective* evidence" (emphasis added)); *cf.* 28 C.F.R. § 35.130(h) (safety requirements must be "based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities"); *see also* U.S. Br. 16 (asserted risk must be "significant and based on objective evidence").[8]

Petitioners' assertion that Sheehan could "escape out the back window or down a fire escape"

---

[8] The law is no different in the Fourth Amendment context. *See Terry*, 392 U.S. at 21 ("[I]n justifying the particular intrusion the police officer must be able to point to *specific and articulable facts* which, taken together with rational inferences from those facts, reasonably warrant that intrusion." (emphasis added)). Petitioners' argument that others might be in Sheehan's room also ignores Sheehan's testimony that, when the door was open, the officers "could see ... that no one else was in the room with me." J.A. 279; *see also* J.A. 411 (showing size and layout of Sheehan's room, denoted "bedroom #3"). At the very least, this evidence raises a jury issue.

(Pet. Br. 29) also makes no sense. Reynolds testified that "[t]he day of the incident I felt Ms. Sheehan probably was a good 250 pounds. Seemed obese to me." J.A. 207; *see also* J.A. 206 (Sheehan's height was "5'5, maybe 5'6"). In the meantime, the record shows—and Petitioners admit—that the less-than-lethal-force unit arrived *before* the officers forcibly reopened the door to Sheehan's room. J.A. 324; Pet. Br. 10. Even if Sheehan had wanted to leave her room (she gave no indication of any such desire), even if her back window led to a fire escape or opened onto a graded hill (there is no evidence supporting either assertion),[9] and even if the police officers truly believed that Sheehan was likely to jump out her second-story window and make a run for it (despite her age, mental disability, and size), a reasonable officer on the scene would know that there was no credible flight risk.

Petitioners also claim that police officers "cannot be faulted for failing to diagnose a mental illness." Pet. Br. 33 (internal quotation marks and citation omitted). But Petitioners acknowledge, as they must, that the officers "knew that Sheehan was mentally ill." Pet. Br. 5. After all, "the very reason the officers encountered Sheehan in the first

---

[9] Petitioners take issue with the court of appeals' statement that Hodge told the officers that the back window could not be used as a means of egress without a ladder (Pet. Br. 7), but Hodge's testimony is consistent with the court's statement. J.A. 116 (testifying that he had explained to the officers: "you have to have a ladder to get in through the window on the second floor").

place was to fulfill their duty to take into custody individuals who are mentally ill and judged to pose a threat to others—a duty imposed on law enforcement officers throughout the nation." Pet. Br. 38. In these circumstances, police officers are well aware that they are interacting with someone who is mentally ill, and they are trained to respond accordingly.[10]

3. Petitioners focus on the wrong issue when they argue that Sheehan posed a threat to Reynolds and Holder "at the time the officers re-opened her door." Pet. Br. 17. The central thrust of Sheehan's ADA claim is that Reynolds and Holder were required to consider her mental disability *before* they reopened her door and forced a violent confrontation. J.A. 320. As Reiter explained, "Officer Holder and Sgt. Reynolds forcibly entered Ms. Sheehan's private residence contrary to reasonable and generally accepted police practices." J.A. 315. The issue, therefore, is not whether Sheehan posed a risk to the police officers *after* they forced the second entry, but rather whether she posed such a significant risk *before* they did so. As discussed above, she did not.

---

[10] Petitioners claim that "assessing the risk" for purposes of an ADA claim "bears more than passing resemblance to the challenge of determining how much force to use to effect an arrest under the Fourth Amendment." Pet. Br. 25. It is not clear why this is so. Nonetheless, Section I above shows that the force used by the officers was unreasonable under the Fourth Amendment balancing test. *See supra* at 14-24.

For similar reasons, this is not a case where the officers were required to make "split-second judgments ... in circumstances that are tense, uncertain, and rapidly evolving." Pet. Br. 25 (internal quotation marks and citation omitted). As Reiter explained, "[p]olice field encounters are seldom 'split second decision making events.'" J.A. 322. Instead, "[t]hey are a series of events," ranging in this case from the initial call (which informed the officers that Sheehan was mentally disabled), to the meeting with Hodge (where the officers were informed that the building had been vacated), to the first entry (when Sheehan demanded to be left alone), and so on. J.A. 322-24. Indeed, when Reynolds and Holder decided to reenter Sheehan's room, they had been on the scene for 26 minutes. J.A. 323. The officers had *numerous* opportunities to "assess the situation, evaluate various tactical approaches and coordinate their efforts with other officers," and police officers are trained to do these things. J.A. 322.[11]

But even if the officers, through no fault of their own, had been required to make split-second

---

[11] *See also* Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People*, 34 Colum. Hum. Rts. L. Rev. 261, 322 (2003) ("*Unreasonable Seizures*") ("A police officer's insistence that he was forced to make a split-second decision would often seem to be a rationalization of his own actions that precipitated a crisis during an incident. The training given to police officers, when followed, minimizes the need for split-second decisions.").

judgments, "nothing in the text of the ADA suggests that a separate exigent-circumstances inquiry is appropriate." *Seremeth v. Bd. of Cnty. Comm'rs Frederick Cnty.*, 673 F.3d 333, 339 (4th Cir. 2012). Instead, "consideration of exigent circumstances is included in the determination of the reasonableness of an accommodation." *Id.*[12] As the Fourth Circuit noted, "this view of the ADA has the ancillary benefit of encouraging the provision of accommodations during exigent circumstances." *Id.* Had Reynolds and Holder complied with that statutory mandate and considered Sheehan's mental disability before deciding to reenter her room—or had they complied with SFPD's training materials or its barricaded suspect policy—no split-second judgments would have been necessary.

Finally, Petitioners also claim that "whether a significant risk exists 'must be determined from the standpoint of the person who refuses the ... accommodation ....'" Pet. Br. 23 (quoting *Bragdon*, 524 U.S. at 649). This argument misapplies the Court's holding in *Bragdon*. The issue in *Bragdon* was whether a dentist violated the ADA when he

---

[12] *Accord Bircoll v. Miami-Dade Cnty.*, 480 F.3d 1072, 1085 (11th Cir. 2007) ("The exigent circumstances presented by criminal activity and the already onerous tasks of police on the scene go more to the reasonableness of the requested ADA modification than whether the ADA applies in the first instance."); *see also* U.S. Br. 15 ("Although law enforcement activities enjoy no categorical immunity from the ADA when arresting an individual with a disability, exigencies surrounding police activity will typically play a significant role in determining whether a modification is reasonable.").

refused to treat in his office a patient infected with HIV 524 U.S. at 628-29. In deciding whether the patient posed a significant threat to the health and safety of others, the Court expressly held that the dentist's "belief that a significant risk existed, *even if maintained in good faith*, would not relieve him from liability." *Id.* at 649 (emphasis added). That holding is consistent with the non-discrimination purpose of the ADA; otherwise, as the Court noted, an individual's subjective beliefs "could excuse discrimination without regard to the objective reasonableness of his actions." *Id.* at 650. Accordingly, in cases involving healthcare risks, courts are to assess "the objective reasonableness of the views of health care professionals *without deferring to their individual judgments*." *Id.* (emphasis added).

Applying this teaching here, it is not enough, as Petitioners argue, that Reynolds and Holder *subjectively* believed that Sheehan posed a threat to the safety of others. The Court should instead apply a totality of the circumstances test to the officers' interaction with Sheehan, give appropriate weight to the views of experienced professionals like Reiter, and assess the *objective reasonableness* of Petitioners' stated concerns. Applying that analysis, there are, at the very least, fact issues as to whether the direct threat exception to the reasonable accommodation requirement is satisfied.

B. The Proposed Modifications Would Have Eliminated Any Risk Sheehan Posed And Were Reasonable.

Even if Petitioners could establish as a matter of law that Sheehan was a significant threat to others, Sheehan's ADA claim is not subject to dismissal. As Petitioners note (Pet. Br. at 22), the ADA regulations define "direct threat" to mean "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures." 28 C.F.R. § 35.104. The regulations also make clear that this determination is to be based on an "individualized assessment." 28 C.F.R. § 35.139(b). Applying these regulations here, there is ample evidence that Reiter's modifications would have eliminated any threat and were reasonable.

1. Reiter described several tactics that Reynolds and Holder *should* have employed: they should have contained Sheehan, respected her comfort zone, used non-threatening communications, and employed the passage of time to their advantage. J.A. 311-12. He further explained: "Had the officers responded in a reasonable manner, consistent with generally accepted police practices the necessity to resort to the use of deadly force would likely not have occurred." J.A. 322. Reiter directly addressed the salient issues: the proposed tactics would have eliminated any threat and were reasonable.

Petitioners attack Reiter's analysis in several ways, each of which fails. First, they claim that the

report "blends 20/20 hindsight with speculation." Pet. Br. 36 n.4. That is both immaterial and incorrect. It is immaterial because the report, at the very least, creates a fact issue that must be resolved at trial. It is also incorrect because Reiter's opinions reflect the unanimous judgment of police professionals about how to handle emotionally disturbed persons. As Professor Michael Avery explains:

> Modern training materials are remarkably consistent in the approach they recommend to officers who respond to calls involving emotionally disturbed persons. The training is designed to protect the safety of the public, minimize the risks to the safety of the responding officer, and deal with the disturbed person in a humane manner, recognizing that he is ill. One such strategy ... emphasizes the following: "(1) safety, (2) non-threatening approach, (3) control of the scene, (4) defusing the situation, and (5) problem solving."

Unreasonable Seizures, 34 Colum. Hum. Rts. L. Rev. at 291 (footnotes omitted). Nor is any of this novel: the International Association of Chiefs of Police recommended the same tactics in responding to emotionally disturbed persons as early as 1979,

and an identical list can be found in other established training materials.[13]

Reiter's report and Professor Avery's article cite enough sources—including SFPD's own training materials and policies—to show that there is no serious dispute among professionals about how to handle these situations. *Id.* at 290 nn.133-38; J.A. 305-06, 311-14. Even in the absence of such training materials, lower courts have concluded that police officers acted reasonably when they used these tactics.[14] Far from blending hindsight with speculation, the fact that Reiter's suggested tactics are incorporated into all police training on this issue demonstrates that the tactics reflect foresight, not hindsight, and Reiter's opinion that different tactics would have led to a different outcome is not speculation, but the empirical experience of officers in the field.

---

[13] *See Unreasonable Seizures*, 34 Colum. Hum. Rts. L. Rev. at 296 & n.170, 325-26 & n.319 (citing *Int'l Ass'n of Chiefs of Police, Training Key No. 274, Abnormal Behavior* 1-2 (1979); Gerard R. Murphy, *Managing Persons with Mental Disabilities: A Curriculum Guide for Police Trainers* (1989); and James J. Fyfe, *Policing the Emotionally Disturbed*, 28 J. Am. Acad. Psychiatry L. 345, 345 (2000)).

[14] *See, e.g., Waller ex rel. Estate of Hunt v. City of Danville*, 556 F.3d 171, 176-77 (4th Cir. 2009) (officers spoke with supervisors, called in a hostage negotiator, attempted to calm the situation, and waited two hours before entering); *Estate of Smith v. Marasco*, 430 F.3d 140, 145 (3d Cir. 2005) (officers spoke with their supervisor, attempted to make contact by phone, and did not enter residence for hours).

Second, Petitioners claim that "the officers' judgment that these measures would not have eliminated the significant risk that Sheehan posed to them and others was reasonable." Pet. Br. 36. This argument fails because there is no evidence that Reynolds and Holder ever considered, let alone reached a "judgment" regarding, reasonable accommodations under the ADA. To the contrary, in Reynolds' view, if "the public is at risk," then "[t]he disability really is not a factor ...." J.A. 206. There is likewise no evidence that the officers consulted with anyone to determine whether such measures might be effective. Instead, the officers concluded that Sheehan was "a violent woman who had already threatened to kill her social worker" (J.A. 235) and decided to storm back into her room to arrest her (J.A. 174). On these facts, there is no reason to defer to the officers' post hoc rationalizations.

Third, Petitioners claim that "non-threatening communications" were ineffective. Pet. Br. 36. To the extent any communications occurred *after* the officers retreated and the door to Sheehan's room was closed—when such communications might have avoided a violent confrontation—the evidence indicates that the officers waited *at most* a few minutes before they decided to forcibly reenter the room. J.A. 40, 61, 323-24, 407. Thus, there was no *meaningful* attempt either to defuse the situation, as Reiter suggests, or to negotiate a surrender, as SFPD's barricaded suspect policy requires. Nor is there any evidence that the officers asked open-ended questions, a technique that Reiter opined is consistent with "generally accepted police

practices" and "documented in the training and written orders of the [SFPD]." J.A. 312. Had the officers done so, they could have learned that Sheehan "wasn't interested in being cooperative" because when she had cooperated with the police on two prior occasions she had suffered a "concussion on my head against the police vehicle" and police had "wrenched my right arm and hurt it." J.A. 270. Using established police practices, as summarized by Reiter and numerous other professionals (*see supra* at 38-39), Petitioners could have addressed Sheehan's concerns and avoided a violent confrontation.

Fourth, Petitioners claim that "all of Reiter's remaining proposals involved delaying Sheehan's arrest, in a situation where she would need only seconds to escape down a fire escape, gather more weapons to prepare for an attack, or fortify herself." Pet. Br. 36. These arguments lack merit for all of the reasons set forth above: Sheehan had no desire to "escape," backup had already arrived and could establish a perimeter, her physical condition hardly presented a flight risk, and throughout the encounter she had only threatened individuals who had entered her room without her permission. As Reiter testified, and as the record confirms, there was no compelling reason to rush into Sheehan's room and every reason to wait. J.A. 312 ("History has shown that the longer the encounter is allowed to occur, the better the chance of a successful and safe resolution.").

2. Reiter's report also shows that the proposed tactics were reasonable and would not

have fundamentally altered the nature of the service, program, or activity. As Reiter notes, the same tactics "are also documented in the training and written orders of the [SFPD]." *Id.* Petitioners' own policies and training materials thus *confirm* the reasonableness of Reiter's tactics and show that *no* fundamental alteration of the officers' conduct was required.

Petitioners nevertheless claim that any delay whatsoever would have been unreasonable because "the officers had probable cause to arrest Sheehan for the violent felony of assault." Pet. Br. 38. Even if it were appropriate to treat Sheehan as a violent felon (which it was not, *see supra* at 20-22), SFPD's barricaded suspects policy applies, on its face, to "a situation where a criminal, intent upon evading arrest, takes up a defensive position armed with a gun, explosive, or a weapon capable of harming others" as well as to hostage situations. *See* General Order 8.02, at II (discussed *supra* at 8). Petitioners have not explained why Sheehan was treated *worse* than a barricaded criminal, but one possible inference is that she was discriminated against *because of her disability*.

Petitioners' argument that "the intrinsic nature of the officers' duty here was to take Sheehan into custody as quickly as possible to protect public safety" (Pet. Br. 41) fails for similar reasons. Far from being told to resolve encounters with mentally ill individuals "quickly" (*id.*), officers are trained to slow things down to allow the situation to resolve peacefully (J.A. 312-13), and the "duty" of police officers under statutes like

California's Section 5150 is to protect the rights of mentally ill individuals as well as public safety.[15] These statutes do not, and cannot, trump accepted police practices for dealing with persons of diminished capacity or authorize excessive force in violation of an individual's constitutional rights. Moreover, as noted previously (*supra* at 21-22, 30-32), Petitioners' repeated references to "public safety" are seriously overstated.

Lastly, Petitioners attempt to bolster their argument that the methods suggested by Reiter were unreasonable by claiming that the "rapidly unfolding circumstances ... did not permit any of the process that typically occurs when a covered entity considers an accommodation." Pet. Br. 39. This argument likewise fails:

- As the United States correctly notes, "when an individual has an impairment that interferes with her ability to request an accommodation, a public entity cannot avoid its ADA obligations by contending that the plaintiff failed to make a specific request." U.S. Br. 21 n.7 (citing *Robertson v. Las Animas Cnty. Sheriff's Dep't*, 500 F.3d 1185, 1197 (10th Cir. 2007)). Here too, Petitioners

---

[15] *See Smith v. Cnty. of Kern*, 25 Cal. Rptr. 2d 716, 720 (Ct. App. 1993) ("section 5150 is designed to protect against injury to the committed individual and the public as a result of the individual's mental condition"); Bruce J. Winick, *Civil Commitment: A Therapeutic Jurisprudence Model* 42 (2005) (civil commitment statutes "protect the individual's well being" and "protect[] community from harm").

have not explained how a mentally ill woman, untrained in the law, would know to request an accommodation under the ADA and what accommodation to request.

- If the "interactive process" referenced by Petitioners applies in Title II cases,[16] it requires plaintiffs to "provide the governmental entity an opportunity to accommodate them *through the entity's established procedures*,"[17] and "*both parties* have an obligation to proceed in a reasonably interactive manner to ascertain a reasonable accommodation."[18] Petitioners did not make any procedures available to Sheehan and did not proceed in a reasonably interactive manner.
- To the extent Sheehan needed to request a reasonable accommodation, she did so by repeatedly demanding that the officers leave her alone. In Reiter's terminology, Sheehan asked the officers to "respect [her] comfort zone" and use "[t]ime" to their advantage. J.A. 312.

---

[16] *But see Meeks v. Schofield*, 10 F. Supp. 3d 774, 791 (M.D. Tenn. 2014) (recognizing that "the interactive process pertains to employment-related ADA claims, not to Title II ADA claims").

[17] *Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 578 (2d Cir. 2003) (emphasis added).

[18] *Barber v. Colo. Dep't of Revenue*, 562 F.3d 1222, 1231 (10th Cir. 2009) (emphasis added; internal quotation marks and citation omitted).

If anything, Petitioners' reliance on the "interactive process" provides strong support for Reiter's opinion that Reynolds and Holder acted unreasonably when they forcibly reopened the door to Sheehan's room with guns drawn and without any meaningful attempt to employ universally accepted police practices designed to minimize the risk of a violent confrontation with a mentally ill individual.

C. The "Special Circumstances" Test In *US Airways v. Barnett* Does Not Apply Here, And The ADA Cases Cited By Petitioners Are Likewise Inapposite.

1. Contrary to the United States' argument (U.S. Br. 17-21), the legal framework set forth in *Barnett* does not logically apply here. In *Barnett*, the plaintiff requested, as an accommodation under Title I of the ADA, that his employer allow him to retain a physically undemanding mailroom position even though more senior employees were allowed to bid on the position. 535 U.S. at 394. In that narrow circumstance, where a requested accommodation "would violate the rules of a seniority system," the Court held that "the employer's showing of violation of the rules of a seniority system is by itself ordinarily sufficient" to establish that the requested accommodation is not "reasonable." *Id.* at 403, 405. At the same time, the Court recognized that "[t]he plaintiff (here the employee) nonetheless remains free to show that special circumstances warrant a finding that, despite the presence of a seniority system (which

the ADA may not trump in the run of cases), the requested 'accommodation' is 'reasonable' on the particular facts." *Id.* at 405.

Because no similar conflict exists here, the *Barnett* framework is inapposite. Whereas the employee's requested accommodation in *Barnett* "would violate the rules of a seniority system" (*id.* at 403), the requested accommodations here would not violate or contradict any of Petitioners' stated rules or policies. To the contrary, those accommodations are entirely consistent with universally accepted police practices designed to minimize the risk of a violent confrontation with a mentally ill individual and SFPD's training materials and barricaded suspect policy. *See supra* at 7-8, 38-39. It is the officers' conduct, not Reiter's suggested tactics, that violated the applicable "rules." On these facts, there is no conflict that would justify adopting the "special circumstances" test in *Barnett* in cases involving arrests of mentally disabled individuals.

For similar reasons, the *Barnett* framework, as argued by the United States, would be bad policy. If that framework were adopted here, police officers will not be required to comply with the ADA's reasonable accommodation requirement when arresting a suspect with a disability who is armed and violent *unless* there are "special circumstances showing that an accommodation was reasonable on the particular facts." U.S. Br. 21. Not only would such a result contradict the "broad" anti-discrimination "mandate" of the ADA (*PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001) (citing 42

U.S.C. § 12101(b))) by sanctioning discrimination against mentally disabled individuals whose illness causes erratic, irrational, or seemingly uncooperative behavior, it would not provide any of the certainty that the law enforcement amici seek: police officers would be left to guess what are or are not "special circumstances" that would require reasonable accommodation.

Nor is it necessary to adopt a "special circumstances" test in Title II cases. Instead, courts can continue to apply 28 C.F.R. § 35.139(a), which makes clear that Title II "does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others." That standard is based on an existing Title II regulation, has been applied by lower courts, is expressed in terms that police officers can easily understand and apply, and will appropriately address the safety concerns identified by Petitioners' supporting amici. Critically, those amici expressly rely on 28 C.F.R. § 35.139(a) *without* arguing that a new and different standard should apply. Int'l Municipal Lawyers Br. 11; Nat'l League of Cities Br. 23. And even when the direct threat exception is not applicable, the accommodation must be "reasonable," which takes into account exigent circumstances. *See supra* at 35. That standard, too, is easily understood, has been applied by courts, and will adequately address

any concerns regarding exigent circumstances and limited resources.[19]

But even if a "special circumstances" test were to apply here, such circumstances are manifestly present. Building on the Court's discussion of "special circumstances" in *Barnett*, the United States claims that special circumstances would exist if, for example, "a plaintiff could demonstrate that her proposed modification did not mark a significant deviation from ordinary police procedures—or was *more* consistent with the entity's procedures for dealing with individuals with disabilities than the officers' actions—and that the exigency had dissipated by the time of the arrest." U.S. Br. 20 (emphasis in original). That is precisely what the record in this case shows: after the officers retreated and the door to Sheehan's room was closed, there was no reason why the

---

[19] For similar reasons, the Court should reject the argument that the most cost-effective way to accommodate people with mental illnesses during arrests is to provide training and that "once that training is provided, individual officers should not be required to perform an ADA accommodations analysis when they face urgent public safety risks." Int'l Municipal Lawyers Br. 3. The argument ignores the very real possibility, amply demonstrated here, that officers will ignore or act contrary to their training. If officers do so and violate the ADA, then there should be ADA liability. Otherwise, disabled individuals will have no recourse where an officer's conduct is reasonable under Fourth Amendment principles but nonetheless discriminates against disabled individuals on the basis of a disability. Nothing in the ADA or its regulations supports such a permissive and unprincipled approach to the statute's non-discrimination mandate.

officers could not have complied with applicable training materials regarding mentally disabled individuals or SFPD's stated policy regarding barricaded suspect incidents. At the very least, these are fact issues that preclude summary judgment in Petitioners' favor.

2. For many of the same reasons, the other cases cited by Petitioners and their supporting amici are readily distinguishable. In many cases, the court sanctioned the use of force by police officers because the situation was uncontained and police officers were directly exposed to a dangerous and unavoidable threat.[20] In another, family members and bystanders were directly exposed to such a threat.[21] In others, the defendants *considered and attempted to accommodate* the plaintiff's disability.[22] Lastly, in one case, the court

---

[20] *See, e.g., De Boise v. Taser Int'l, Inc.*, 760 F.3d 892, 895 (8th Cir. 2014), *petition for cert. filed* (U.S. Jan. 8, 2015) (No. 14-812) (plaintiff exited home and approached officers); *Bates ex rel. Johns v. Chesterfield Cnty.*, 216 F.3d 367, 369 (4th Cir. 2000) (plaintiff attacked officer outside home); *Hainze*, 207 F.3d at 797 (plaintiff attacked officers with knife on public street); *Gohier v. Enright*, 186 F.3d 1216, 1218 (10th Cir. 1999) (plaintiff walked toward officer on public street with object that appeared to be a knife). Petitioners' reliance on *De Boise* (Pet. Br. 31) is also misplaced because, as noted above, a petition for a writ of certiorari was filed and remains pending in that case.

[21] *See Seremeth*, 673 F.3d at 335.

[22] *See, e.g., Seremeth*, 673 F.3d at 335 (American Sign Language trainee and plaintiff's father called as interpreter); *Waller*, 556 F.3d at 176-77 (discussed *supra* at 39 n.14);

(continued . . .)

found the requested accommodation was unreasonable because it would interfere with the officer's ability to accurately measure inebriation during a DUI stop.[23]

The situation here is markedly different. Viewing the facts in the light most favorable to Sheehan, the "direct threat" exception to the reasonable accommodation requirement was not satisfied. *See supra* at 29-33. And it is undisputed that Reynolds and Holder did not consider Sheehan's disability when they decided to forcibly reenter her room. *See supra* at 6. Nor did they make any meaningful attempt to employ universally accepted police practices designed to minimize the risk of a violent confrontation with a mentally ill individual. *See supra* at 40-41. Instead, contrary to applicable training materials and SFPD's barricaded suspect policy, they "cause[d] a violent—and potentially deadly—confrontation with a mentally ill person without a countervailing need." Pet. App. 31. The Court should not sanction such misconduct.

(. . . continued)
Tucker v. Tennessee, 539 F.3d 526, 528 (6th Cir. 2008) (pen and paper and untrained interpreter used to communicate).

[23] *Bircoll*, 480 F.3d at 1086.

III. Reynolds And Holder Are Not Entitled To Qualified Immunity Because They Acted Contrary To Clearly Established Circuit Precedent When They Forcibly Reopened The Door To Sheehan's Room With Guns Drawn Without Any Meaningful Consideration Of Her Mental Disability.

A. Addressing Sheehan's Section 1983 claim against Reynolds and Holder, Petitioners claim that the court of appeals erred in concluding that the officers are not entitled to qualified immunity. Pet. Br. 41-59. In considering qualified immunity on summary judgment, courts engage in a two-pronged inquiry. Under the first prong, courts must examine whether the facts "[t]aken in the light most favorable to the party asserting the injury ... show the officer's conduct violated a [federal] right." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Under the second prong, courts ask whether the right at issue was "clearly established" at the time of the alleged misconduct. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). The Court recently emphasized that, in deciding *both* prongs, courts "may not resolve genuine disputes of fact in favor of the party seeking summary judgment." *Tolan*, 134 S. Ct. at 1866 (citing *Brosseau v. Haugen*, 543 U.S. 194, 195 n.2 (2004) (*per curiam*); *Saucier*, 533 U.S. at 201; and *Hope*, 536 U.S. at 733 n.1).

1. Starting with the first prong—whether the evidence, viewed in Sheehan's favor, shows a violation of a constitutional right—the answer is yes. As set forth above (*supra* at 14-24), it was

objectively unreasonable, and therefore a violation of Sheehan's Fourth Amendment rights, for Reynolds and Holder to forcibly reopen the door to Sheehan's room with guns drawn without taking her mental illness into account and, contrary to police officer training, without any meaningful attempt to employ universally accepted police practices designed to minimize the risk of a violent confrontation with a mentally ill individual. Critically, Petitioners do not directly challenge that determination; instead, their second Question Presented asserts only that the law regarding this issue was not clearly established (Pet. Br. i), which is the second prong of the qualified immunity analysis.

2. Turning to that second prong, the court of appeals identified three cases that govern this inquiry. The first case is *Graham*. Pet. App. 33. As discussed previously (*supra* at 16), the Court held in *Graham* that "[d]etermining whether the force used to effect a particular seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." 490 U.S. at 396 (internal quotation marks and citation omitted). When the facts are viewed in the light most favorable to Sheehan—as required by *Tolan*, 134 S. Ct. at 1866—the result under *Graham* is precisely as the court of appeals concluded: "If there was no pressing need to rush in [*i.e.*, no significant governmental interests at stake], and every reason to expect that doing so would result in Sheehan's

death or serious injury [*i.e.*, a significant intrusion on Sheehan's Fourth Amendment rights], then any reasonable officer would have known that this use of force was excessive." Pet. App. 33.

The court of appeals also cited circuit precedent applying *Graham* in the circumstances similar to those presented here. In *Alexander*, police officers, while assisting in the execution of an administrative warrant, shot and killed a mentally ill man who had threatened to shoot the officers if they entered his house and had attempted to do so after the police officers broke down his door. 29 F.3d at 1358. The facts in *Alexander* were more favorable to the police officers than are the facts of this case in two significant respects: (1) unlike Sheehan, who had only a small bread knife, the suspect in *Alexander* had a gun and threatened to shoot the officers with it; and (2) unlike Reynolds and Holder, who ignored their training and SFPD's barricaded suspect policy, the officers in *Alexander* (who happened to be *SFPD* officers) waited for backup to arrive, including "a team of hostage negotiators," and "tried to talk to" the suspect for "nearly an hour" before storming in. *Id.* Despite those facts, absent here, the Ninth Circuit found that the "[p]laintiff's claim, if supported by the evidence, states a classic Fourth Amendment violation under *Graham*." *Id.* at 1366.

The Ninth Circuit addressed a similar situation, with equal clarity, in *Deorle*. Deorle had threatened to hurt the police officers surrounding his property, acted as though he might attempt suicide by cop, and was carrying a bottle of lighter

fluid as he approached the officer who shot him. 272 F.3d at 1276-78. But he was confined and crisis negotiators were en route. *Id.* Applying *Graham*, the Ninth Circuit rejected the officer's qualified immunity defense because "[e]very police officer should know that it is objectively unreasonable to shoot ... an unarmed man who: has committed no serious offense, is mentally or emotionally disturbed, has been given no warning of the imminent use of such a significant degree of force, poses no risk of flight, and presents no objectively reasonable threat to the safety of the officer or other individuals." *Id.* at 1285. Also significant here, the court emphasized that "where it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that *must* be considered in determining, under *Graham*, the reasonableness of the force employed." *Id.* at 1283 (emphasis added). The Ninth Circuit reiterated that point in *Drummond*. Citing *Deorle*, the court stated: "we have held that a detainee's mental illness *must be reflected in any assessment* of the government's interest in the use of force." 343 F.3d at 1058 (emphasis added). Contrary to these preexisting decisions in the relevant circuit, the officers in this case *did not consider* Sheehan's disability when they decided to forcibly reenter her room with guns drawn. *See supra* at 6. Such conduct violates clearly established case law.

B. Petitioners and the United States take issue with the above analysis, but their arguments are without merit.

1. Petitioners and the United States criticize the court of appeals' analysis under *Graham* as an attempt to define clearly established law at an impermissibly high level of generality. Pet. Br. 47; U.S. Br. 30-31. These arguments do not accurately reflect the court of appeals' analysis. The court did not hold that *Graham* addressed the specific facts at issue here. Rather, it analyzed the circumstances of this case within the balancing test in *Graham* and held—as *Graham* clearly established—that the use of deadly force is unreasonable if there is no countervailing governmental interest. Pet. App. 33. Viewing the facts in the light most favorable to Sheehan, that result clearly follows from *Graham*. But even if that constitutional right was not clearly established in *Graham*, it certainly was in *Alexander* and *Deorle* (the other cases that the court of appeals cited in support of its ruling (Pet. App. 33-36)).

2. Petitioners and the United States attempt to avoid this controlling circuit precedent in numerous ways. First, they ask a different question: whether it was clearly established that a violent and armed suspect has a Fourth Amendment right to be free from lawful, forcible entry if such entry might provoke a violent confrontation. Pet. Br. 43-45; U.S. Br. 28. That question, too, misconstrues the court of appeals' ruling. The crux of that ruling is that it was unreasonable for Reynolds and Holder to force a violent and potentially deadly confrontation (a) "without taking Sheehan's mental illness into account" (Pet. App. 26), and (b) "without a countervailing need" (Pet. App. 31). Regardless of

whether the officers' actions might provoke a violent confrontation, Sheehan's constitutional rights were clearly established, at the appropriate level of specificity (*see Wilson v. Layne*, 526 U.S. 603, 615 (1999); U.S. Br. 23), by *Graham*, *Alexander*, and *Deorle*.

Second, Petitioners and the United States claim that *Alexander* can be distinguished because the police officers entered the plaintiff's home to execute an administrative warrant, not to arrest the plaintiff or under the emergency aid or exigent circumstances exception to the warrant requirement, and that *Deorle* is distinguishable because Deorle, unlike Sheehan, was unarmed, had not attacked anyone, and had generally obeyed police instructions. Pet. Br. 47-48; U.S. Br. 31-32. These distinctions are immaterial. If there is no *immediate need* to enter an individual's home, as in *Alexander* and this case, then doing so by force, with guns drawn, is unreasonable. In addition, Reynolds and Holder knew that Sheehan was acting irrationally due to her mental illness, that her conduct was not purposeful, and that she had not threatened anyone who did not enter her room without her permission. *Supra* at 20-21. But contrary to circuit precedent holding that an individual's emotional disturbance "must be considered in determining, under *Graham*, the reasonableness of the force employed" (*Deorle*, 272 F.3d at 1283), the officers did not consider Sheehan's mental disability when they decided to forcibly reenter Sheehan's room. *Deorle* clearly established that requirement, and *Drummond*

confirmed it, long before the officers confronted Sheehan.

Third, Petitioners and the United States argue that the court of appeals' holding conflicts with several cases in which this Court recognized police officers' need, in various contexts, to act swiftly to minimize the risk of a violent confrontation or secure evidence. Pet. Br. 43-44; U.S. Br. 29. In some of those cases, police officers entered dwellings to protect others from an apparent threat[24] or while in hot pursuit of suspects.[25] In another, the Court declined to apply the exclusionary rule to evidence collected after execution of a warrant that violated the knock-and-announce rule, explaining that such a result might lead to preventable violence or destruction of evidence.[26] In Petitioners' other case, the Court upheld a warrantless entry based on a credible threat of destruction of evidence.[27] This case, in contrast, did not involve a hot pursuit or risk of ambush, flight, or destruction of evidence.

Fourth, Petitioners argue that the court of appeals' ruling is not consistent with other Ninth Circuit decisions. Pet. Br. 45-50 (discussing cases). But none of the decisions referenced by Petitioners

---

[24] *See, e.g.*, *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

[25] *Warden v. Hayden*, 387 U.S. 294, 297-99 (1967); *United States v. Santana*, 427 U.S. 38, 42-43 (1976).

[26] *Hudson v. Michigan*, 547 U.S. 586, 595 (2006).

[27] *Kentucky v. King*, 131 S. Ct. 1849, 1860 (2011).

abrogates the pertinent legal principles, clearly established in *Alexander* and *Deorle*, that it is manifestly unreasonable to force a violent and potentially deadly confrontation with a mentally ill individual (a) without a countervailing need and (b) without considering the individual's mental disability.

The Ninth Circuit recognized as much in *Billington v. Smith*, 292 F.3d 1177 (9th Cir. 2002). Petitioners make much of the fact that *Billington* acknowledged that subsequent cases have placed "important limitations on *Alexander*" (Pet. Br. 48), but they never attempt to identify the core holding that remains untouched. Contrary to Petitioners' representation, the *Billington* court did not hold that so long as an entry satisfies an exception to the warrant requirement it can be upheld as lawful even if "imprudent," "inappropriate," and "reckless." *Id.* Instead, the court merely noted that a plaintiff must do more than submit an expert report that contains such accusations. *Billington*, 292 F.3d at 1189. As *Billington* holds, courts must ultimately "decide as a matter of law whether a reasonable officer could have believed that his conduct was justified." *Id.* (internal quotation marks and citation omitted). Here, no reasonable officer could have believed that breaking through Sheehan's door with guns drawn was justified in light of her mental disability and the lack of a countervailing need.

As to the so-called "provocation theory," the court in *Billington* expressly read *Alexander*, as limited by subsequent case law, "to hold that where

an officer intentionally or recklessly provokes a violent confrontation, *if the provocation is an independent Fourth Amendment violation*, he may be held liable for his otherwise defensive use of deadly force." *Id.* (emphasis added). Here, as discussed above (*supra* at 14-24), there is such an independent Fourth Amendment violation. And while various courts have found no Fourth Amendment violation when an officer used force against a disabled individual (*see* Pet. Br. 49), those cases involved credible and unavoidable threats of harm to police and others and truly exigent circumstances.[28] In this case, in contrast, had it not been for the officers' unreasonable and unlawful conduct, any potential threat would have been avoidable.

3. Moving beyond controlling case law in the Ninth Circuit, Petitioners and the United States

---

[28] *See, e.g.*, *Fisher v. City of San Jose*, 558 F.3d 1069, 1080 (9th Cir. 2009) (upholding warrantless entry by police after a 12-hour standoff with an inebriated individual who had threatened to shoot officers and aimed a rifle at them from inside his apartment); *Gregory v. Cnty. of Maui*, 523 F.3d 1103, 1108 (9th Cir. 2008) (no violation where police used physical control tactics to disarm and subdue a suspect who lunged at them with a weapon); *Long v. City & Cnty. of Honolulu*, 511 F.3d 901, 904-05 (9th Cir. 2007) (no violation where suspect appeared to shoot at officers from his property after lengthy standoff and after having previously shot two other people); *Blanford v. Sacramento Cnty.*, 406 F.3d 1110, 1112-14 (9th Cir. 2005) (no violation where suspect was shot while wielding a 2-1/2 foot sword attempting to enter a residence after having failed to heed repeated commands to stop).

argue that the applicable legal principles were not clearly established in light of the rulings of other circuits. *See* Pet. Br. 50-54; U.S. Br. 30. Those cases are irrelevant in light of *Alexander*, *Deorle*, and *Drummond*, which are *controlling authority within the Ninth Circuit*. *See Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084 (2011) (recognizing "controlling authority" principle); *Wilson*, 526 U.S. at 617 (same); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (same). Moreover, even in other circuits, courts have recognized that an individual's mental state is relevant in assessing the reasonableness of the use of force. *See, e.g.*, *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 904 (6th Cir. 2004); *Ludwig v. Anderson*, 54 F.3d 465, 472 (8th Cir. 1995).

Petitioners' reliance on state law is equally misplaced. Citing *Stanton v. Sims*, 134 S. Ct. 3 (2013), Petitioners claim that Reynolds and Holder are entitled to qualified immunity because a California statute relieved them of a duty to retreat. Pet. Br. 54. In *Stanton*, the Court cited two California state court decisions applying the hot pursuit doctrine to warrantless misdemeanor arrests to illustrate that a right was not clearly established by a previous decision of the Court. 134 S. Ct. at 7. Here, in contrast, the federal right is clearly established by circuit precedent, including *Alexander* and *Deorle,* as well as by *Graham*. *Stanton* did not hold, nor is there any logical basis to hold, that a *state statute* can somehow authorize conduct that violates a clearly established constitutional right.

4. Finally, Petitioners argue that Reynolds and Holder are entitled to qualified immunity because, under some set of facts, a court could find that they reasonably concluded that they needed to immediately force a second entry to disarm Sheehan. Pet. Br. 56-59. The United States, too, asserts that the reasonableness of the officers' actions should be decided as a matter of law. U.S. Br. 27 n.10. These arguments ignore the requirement, recently emphasized in *Tolan*, that all facts must be construed in the non-moving party's favor on summary judgment, including in a qualified immunity analysis. 134 S. Ct. at 1866. When the facts are viewed favorably to Sheehan, Reynolds and Holder are not entitled to qualified immunity. But at the very least, whether Sheehan posed an imminent threat after the officers retreated and the door to her room was closed is a fact issue that should be resolved at trial in accordance with the court of appeals' ruling. Pet. App. 36. If there was no such threat, as the discussion above shows, then even "plainly incompetent" officers (Pet. Br. 42; U.S. Br. 23) would know that they cannot rush into a mentally disabled individual's home with guns drawn and without any meaningful attempt to employ universally accepted police practices designed to minimize the risk of a violent confrontation with a mentally ill individual. Qualified immunity confers no such right.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

LEONARD J. FELDMAN
Counsel of Record
PETERSON WAMPOLD ROSATO
LUNA KNOPP
1501 4TH AVENUE, SUITE 2800
SEATTLE, WA 98101
(206) 624-6800
feldman@pwrlk.com

Counsel for Respondent

APPENDIX

APPENDIX

Page(s)

1. Amendment IV of the United States Constitution 1a
2. 42 U.S.C. § 1983 ..... 1a
3. 42 U.S.C. § 12101 ..... 2a
4. 42 U.S.C. § 12131 ..... 3a
5. 42 U.S.C. § 12132 ..... 3a
6. 28 C.F.R. § 35.104 ..... 4a
7. 28 C.F.R. § 35.130 ..... 4a
8. 28 C.F.R. § 35.139 ..... 5a
9. California Welfare & Institutions Code § 5150 (effective to June 26, 2012) 5a
10. California Welfare & Institutions Code § 5008 ..... 6a

APPENDIX

1. Amendment IV of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. 42 U.S.C. § 1983 provides:

Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the

District of Columbia shall be considered to be a statute of the District of Columbia.

3. 42 U.S.C. § 12101 provides in pertinent part:

Findings and purpose

* * * * *

(b) Purpose

It is the purpose of this chapter--

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

4. 42 U.S.C. § 12131 provides in pertinent part:

Definitions

As used in this subchapter:

(1) Public entity

The term "public entity" means—

(A) any State or local government; [and]

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government[.]

* * * * *

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

5. 42 U.S.C. § 12132 provides:

Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by

reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

6. 28 C.F.R. § 35.104 provides in pertinent part:

Definitions.

For purposes of this part, the term—

* * * * *

Direct threat means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services as provided in § 35.139.

7. 28 C.F.R. § 35.130 provides in pertinent part:

General prohibitions against discrimination.

* * * * *

(b)(7) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

* * * * *

8. 28 C.F.R. § 35.139 provides:

Direct threat.

(a) This part does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others.

(b) In determining whether an individual poses a direct threat to the health or safety of others, a public entity must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.

9. California Welfare & Institutions Code § 5150 (effective to June 26, 2012) provided:

When any person, as a result of mental disorder, is a danger to others, or to himself or herself, or gravely disabled, a peace officer, member of the attending staff, as defined by regulation, of an evaluation facility designated by the county, designated members of a mobile crisis team

provided by Section 5651.7, or other professional person designated by the county may, upon probable cause, take, or cause to be taken, the person into custody and place him or her in a facility designated by the county and approved by the State Department of Mental Health as a facility for 72-hour treatment and evaluation.

Such facility shall require an application in writing stating the circumstances under which the person's condition was called to the attention of the officer, member of the attending staff, or professional person, and stating that the officer, member of the attending staff, or professional person has probable cause to believe that the person is, as a result of mental disorder, a danger to others, or to himself or herself, or gravely disabled. If the probable cause is based on the statement of a person other than the officer, member of the attending staff, or professional person, such person shall be liable in a civil action for intentionally giving a statement which he or she knows to be false.

10. California Welfare & Institutions Code § 5008 provides in pertinent part:

Definitions

* * * * *

(h)(1) For purposes of Article 1 (commencing with Section 5150), Article 2 (commencing with Section 5200), and Article 4 (commencing with Section 5250) of Chapter 2, and for the purposes of Chapter

3 (commencing with Section 5350), "gravely disabled" means either of the following:

(A) A condition in which a person, as a result of a mental health disorder, is unable to provide for his or her basic personal needs for food, clothing, or shelter.

(B) A condition in which a person, has been found mentally incompetent under Section 1370 of the Penal Code....

REPLY BRIEF

Supreme Court, U.S.
FILED
MAR 11 2015
OFFICE OF THE CLERK

No. 13-1412

In The
Supreme Court of the United States

CITY AND COUNTY OF
SAN FRANCISCO, CALIFORNIA, *et al.*,

Petitioners,

v.

TERESA SHEEHAN,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

REPLY BRIEF

SAN FRANCISCO CITY
ATTORNEY'S OFFICE
DENNIS J. HERRERA
City Attorney
CHRISTINE VAN AKEN
Chief of Appellate Litigation
PETER J. KEITH, *Counsel of Record*
Deputy City Attorney
1390 Market Street, 7th Floor
San Francisco, CA 94102
(415) 554-3908
peter.keith@sfgov.org

Counsel for Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

Page

A. Because the officers had a reasonable basis to believe that Sheehan posed a threat of serious harm to them or others, and modifications would not eliminate that significant risk, her mental illness did not require them to delay her arrest or use de-escalation techniques to arrest her 3

B. Reynolds and Holder are entitled to qualified immunity because they did not violate Sheehan's clearly established Fourth Amendment rights by reentering her room to arrest her 18

APPENDIX

California Department of Justice, Commission on Peace Officer Standards and Training, *Basic Course Workbook Series, Student Materials, Learning Domain 37, People with Disabilities, Version 5.1* (2013) (excerpt) 1a

TABLE OF AUTHORITIES

Page

CASES

Alexander v. City & County of San Francisco, 29 F.3d 1355 (9th Cir. 1994) 22

Ashcroft v. al-Kidd, ___ U.S. ___, 131 S. Ct. 2074 (2011) 22

Billington v. Smith, 292 F.3d 1177 (9th Cir. 2002) 23

Bircoll v. Miami-Dade County, 480 F.3d 1072 (11th Cir. 2007) 14

Bragdon v. Abbott, 524 U.S. 624 (1998) 3, 4, 5, 15

Brigham City, Utah v. Stuart, 547 U.S. 398 (2008) 13, 20

De Boise v. Taser Int'l, Inc., 760 F.3d 892 (8th Cir. 2014) 14

Devenpeck v. Alford, 543 U.S. 146 (2004) 20

Donahue v. Consol. Rail Corp., 224 F.3d 226 (3d Cir. 2000) 9, 13

Drummond v. City of Anaheim, 343 F.3d 1052 (9th Cir. 2003) 19

EEOC v. Amego, 110 F.3d 135 (1st Cir. 1997) 13

Georgia v. Randolph, 547 U.S. 103 (2006) 21

Graham v. Connor, 490 U.S. 386 (1989) 4, 19

Kentucky v. King, ___ U.S. ___, 131 S. Ct. 1849 (2011) 21

Kolstad v. American Dental Ass'n, 527 U.S. 526 (1999) 24

TABLE OF AUTHORITIES – Continued

Page

Maryland v. Garrison, 480 U.S. 79 (1987).....15

Michigan v. Tyler, 436 U.S. 499 (1978).....20

Mincey v. Arizona, 437 U.S. 385 (1978).....20

Pearson v. Callahan, 555 U.S. 223 (2009).....24

Penn. Dep't of Corrections v. Yeskey, 524 U.S. 206 (1998).....5

PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001)....14, 16

Ryburn v. Huff, ___ U.S. ___, 132 S. Ct. 987 (2012).....5

Sch. Bd. of Nassau Cty. v. Arline, 480 U.S. 273 (1987).....3

Scott v. Harris, 550 U.S. 372 (2007).....13

Scott v. Henrich, 39 F.3d 912 (9th Cir. 1994).....11

Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989).....21

U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002).....15, 16

Warden, Md. Penitentiary v. Hayden, 387 U.S. 294 (1967).....20

Washington v. Harper, 494 U.S. 210 (1990).....14

STATUTES, REGULATIONS, AND RULES

Americans with Disabilities Act of 1990, Title II, 42 U.S.C. § 12131 *et seq.* .....*passim*

42 U.S.C. § 12134 5

TABLE OF AUTHORITIES – Continued

Page

Cal. Penal Code § 13500 9

Cal. Penal Code § 13510(a) 9

Cal. Penal Code § 13515.25 9

28 C.F.R. § 35.104 11

28 C.F.R. § 35.130 ..... 3, 14

28 C.F.R. § 35.139 ..... 3, 4, 11

S. Ct. Rule 14.1 23

REFERENCES

California Department of Justice, Commission on Peace Officer Standards and Training, *Basic Course Workbook Series, Student Materials, Learning Domain 37, People with Disabilities, Version 5.1* (2013), https://www.post.ca.gov/student-workbooks.aspx 10

San Francisco Police Dep't General Order 8.02, http://www.sf-police.org/modules/ShowDocument.aspx?documentid=14748 ..... 10, 11

U.S. Dep't of Justice, *Commonly Asked Questions About the Americans with Disabilities Act & Law Enforcement* (Apr. 4, 2006) 17

U.S. Dep't of Justice, *Communicating with People Who Are Deaf or Hard of Hearing: ADA Guide for Law Enforcement Officers* (Jan. 2006) 17

A police officer facing an armed suspect has a paramount duty to protect public safety by preventing violence. If Teresa Sheehan were not mentally ill, there could be little doubt that the officers' actions here – in reentering her room to disarm and arrest her after she attacked them with a knife and threatened to kill them – would be beyond reproach. The result here turns, then, on whether the lawfulness of this police response changes because of Sheehan's mental illness under Title II of the Americans with Disabilities Act or the Fourth Amendment.

On the facts of this case, Sheehan's mental illness did not render the officers' response unlawful. Title II does not require police officers to accommodate an armed and violent mentally ill suspect where the suspect presents a significant risk of harm to others, in the objectively reasonable judgment of the officers, based on the facts known to them at the time. Sheehan presented such a risk here, because even after she shut her door the officers could not simply assume that she had no means of escape and no access to guns or other weapons she could use against them. Nor is the proposed accommodation Sheehan now argues for – delay in her arrest, coupled with use of crisis de-escalation techniques – a reasonable one because of the possibility that Sheehan, behind a closed door, could have used delay not to calm herself but for escape, attack, or fortification.

While Sheehan casts the undisputed facts differently, and contends that she was no longer a threat once she shut her door, her claim depends on facts

that were unknown and unknowable to the officers at that moment. In rapidly unfolding circumstances like these, the determination that a disabled person presents a direct threat, or that an accommodation is not reasonable, must be viewed from the perspective of the accommodations decisionmaker, in light of the information she has. To view the facts as Sheehan suggests would imbue the reasonableness inquiry with the same hindsight bias that this Court has repeatedly rejected in other police contexts, and would create new and far-reaching uncertainty for police – who encounter people with mental illness increasingly frequently in their daily duties. The Court should reject any outcome that would require police and the public to tolerate danger as an accommodation. Likewise, the Court should reject Sheehan's claim that Title II requires officers to use crisis de-escalation techniques whenever they respond to a mentally ill person. De-escalation techniques are sometimes appropriate, and the San Francisco Police Department trains officers to use them – but not before they have first addressed immediate threats to public safety. Title II similarly does not demand use of these techniques in all encounters but only those where their use is "reasonable." Delaying the arrest of an armed suspect who has just threatened violence, and may have other means to carry out her threats, is not reasonable.

Nor was it clearly established that the officers violated Sheehan's Fourth Amendment rights by reentering her room where they could foresee that

she might respond violently. Resistance creates no right to be free from a seizure. And while the role of mental illness in Fourth Amendment analysis has not yet been addressed by this Court, and may be better left for explication in a future case, at a minimum the Ninth Circuit erred in reading its own precedents, treating mental illness on very different facts, as clearly establishing a controlling rule here.

A. Because the officers had a reasonable basis to believe that Sheehan posed a threat of serious harm to them or others, and modifications would not eliminate that significant risk, her mental illness did not require them to delay her arrest or use de-escalation techniques to arrest her

1. Title II of the ADA does not permit police officers to assume that erratic conduct caused by mental illness is dangerous. *See* 28 C.F.R. § 35.130(h). But neither does it require officers to ignore dangerous conduct because it may be caused by mental illness. Instead, Title II and its implementing regulations excuse a public entity from making accommodations, such as delaying an arrest or using special procedures to effect an arrest, to someone who "poses a direct threat to the safety of others," 28 C.F.R. § 35.139(a), where a direct threat is "a significant risk that cannot be eliminated" by modifying the government activity, *id.* § 35.104; *see also Bragdon v. Abbott*, 524 U.S. 624, 648-49 (1998); *Sch. Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 287-88 (1987).

Determining whether a disabled person poses such a threat requires an "individualized assessment, based on reasonable judgment that relies on the best available objective evidence to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices or procedures or the provision of auxiliary services will mitigate the risk." 28 C.F.R. § 35.139(b). Applying these principles to arrests, it is clear that an armed mentally ill person who has made a credible, imminent threat to attack police or others is not entitled to an accommodation in her arrest until the threat she poses has abated.

The determination that a mentally ill person poses a significant risk to the safety of others must be an "objective[ly] reasonable[ ]" judgment, *Bragdon*, 524 U.S. at 650, free from stereotype or irrational fear. But its reasonableness must be assessed "from the standpoint of the person who refuses the accommodation" in light of the "objective evidence" that is "available" to that decisionmaker. *Id.* at 649, 650. Here, this Court must assess the risk determination from the perspective of Reynolds and Holder, based only on the information they had at the time they determined how great a threat Sheehan posed, and what to do about it. Where a police officer must make a "split-second judgment[ ]" about risk "in circumstances that are tense, uncertain, and rapidly evolving," *Graham v. Connor*, 490 U.S. 386, 396, 397 (1989), long experience has taught courts not to

assess reasonableness "[w]ith the benefit of hindsight and calm deliberation" but instead from the viewpoint of an officer on the scene in that moment, *Ryburn v. Huff*, ___ U.S. ___, 132 S. Ct. 987, 992 (2012).

Respondent makes the wholly atextual claim that "the direct threat exception to the reasonable accommodation requirement does not apply" to situations "when an individual's mental illness is the reason for a police officer's interaction with that person," especially where the service offered by the police is "involuntary." Resp. Br. 27 (emph. omitted). Nothing in the direct threat regulation carves out special services for the disabled from its reach, and respondent makes no argument that the regulation lacks the force of law. *See* 42 U.S.C. § 12134(a); *Bragdon*, 524 U.S. at 646. And this Court long ago concluded that the "voluntariness" of a government service has no bearing on whether the ADA applies to it. *Penn. Dep't of Corrections v. Yeskey*, 524 U.S. 206, 210-11 (1998) (ADA applies to prisons). But even if the direct threat regulation tacitly excluded government services provided exclusively to the disabled, like transport to a psychiatric facility, her argument would make no difference here, because at the time Reynolds and Holder reentered Sheehan's apartment to disarm and arrest her, they were no longer providing a special service to a disabled person. Instead they were making an arrest, as they would anyone who attacked officers or others with a deadly weapon. J.A. 174-75.

2. On the undisputed facts of this case, Sheehan posed a significant risk to the officers and others, a risk that could not be eliminated by a modification such as delaying her arrest or using crisis de-escalation techniques.

a. Sheehan's contrary argument about the danger she posed rests on hindsight bias and a significant distortion of the facts. She does not take issue with the officers' first entry into her apartment, where they knocked on her door, explained that they wanted to help her, and eventually entered with their weapons holstered when she did not respond to their queries, J.A. 27, 49, 217, 227.[1] Instead, Sheehan focuses exclusively on their second entry, arguing that she was no longer a threat after she shut her door. Resp. Br. 33. But when the officers decided to reenter Sheehan's room, they knew beyond question that Sheehan was violent and intended harm. *See* U.S. Br. 27 n.10. After all, Sheehan had just "yelled" that she was going to kill the officers and "charge[d]" or "rapidly walked" toward them bearing an eleven-inch

---

[1] *Amici* the American Psychiatric Association *et al.* (APA) do not take issue with the officers' second entry but claim Sheehan was denied a reasonable accommodation when officers attempted to transport her for psychiatric evaluation without "direct involvement of mental health professionals." Br. 27-28. That is not Sheehan's claim. Resp. Br. 33. But in any event, the claim lacks merit. A city-funded mental health professional, Heath Hodge, in fact made the first contact with Sheehan, and he accompanied the officers during their initial efforts to persuade Sheehan to accompany them to a treatment facility. J.A. 19, 21.

knife whose serrated fixed blade measured six inches. J.A. 37, 105, 225, 284, 405. Reynolds tried to brace Sheehan's door open with her foot, but as Sheehan closed the distance towards her, Reynolds saw she would be stabbed if she kept her foot in place. J.A. 226.

The officers had a reasonable basis to believe that Sheehan continued to pose a significant risk even after she shut the door. She could easily have reopened the door and attempted to stab them again. They could not be certain that no one else was in the room with her; they were unable to canvass the "cluttered" room completely when they first opened her door. J.A. 37, 95, 409. While Hodge had told the officers he had cleared the building of occupants after Sheehan initially threatened him, J.A. 96, they knew that Hodge had left the building to go to a corner store after that, J.A. 26. They could not be sure no one had entered while he was gone. J.A. 47. Nor could the officers know whether Sheehan had secreted guns or other weapons in the cluttered room in addition to the plate of knives. J.A. 198. They did not know whether she "would barricade herself in her room, making their ultimate entry more dangerous." U.S. Br. 26-27 n.9. And they did not know whether Sheehan could escape. J.A. 199. Hodge had given the officers some information about access into the room; exactly what he said is not clear from the record. He believed the officers would need a ladder to get *into* Sheehan's room, but he also thought there was a fire escape, J.A. 116-17, which would allow Sheehan to

get *out*. Taking time to investigate these possibilities further was time Sheehan could spend escaping or arming herself. J.A. 234-35.

Sheehan says that "backup officers had both the back and the front of the building covered" when Reynolds and Holder reentered her room. Resp. Br. 5. That is not a fair reading of the record. Instead, after Sheehan closed her door, the officers simultaneously called for backup and immediately began attempting to reopen the door. J.A. 40. Initially, Reynolds tried to force the door, but then Holder, who was bigger than her sergeant, stepped in to try to open it by kicking and shoving it. J.A. 40-41. While Holder was working on the door, Reynolds heard the sirens of the backup officers, who arrived faster than she expected, and she turned to tell Hodge to open the front door for them. J.A. 41. When Reynolds turned back toward Holder, she saw that Holder had just gotten the door open – and Sheehan was already coming out of the door with the knife in her hand. J.A. 41, 52, 55. Sheehan's claim that the *back* of the building was covered at that moment – a claim she makes for the first time to this Court – finds no support in any of her record citations. Resp. Br. 5-6 (citing J.A. 12-13, 40-41, 50-51, 60-61, 232, 235, 407). In fact, the record of police calls shows that the calls the dispatcher relayed for "unit to back" and "send [unit] 70 to the back of the building," J.A. 407, came not from a backup unit confirming its presence, as Sheehan mistakenly suggests, Resp. Br. 5 (citing J.A. 407), but from *Holder herself*, continuing to ask for assistance.

See J.A. 407 at 11:27:31 (call sign for "Holder Kathrine E" is 3D5A); *id.* at 11:52:39 & 11:52:45 (references to "back" by call sign 3D5A). This record demonstrates not a cavalier confrontation but the officers' grave concerns about Sheehan's next steps, reflected in their actions to take all possible steps to abate the danger.

Although the officers could not be *certain* any of the scenarios they were concerned about would come to pass, they did not need certainty to be justified in treating Sheehan as posing a significant risk. "If [a] threatened harm is grievous even a small risk may be 'significant.'" *Donahue v. Consol. Rail Corp.*, 224 F.3d 226, 231 (3d Cir. 2000). Because under these circumstances "a reasonable officer could have believed that there was an imminent threat of violence," U.S. Br. 27 n.9, the officers' risk judgment had a reasonable basis. That is all that is required for the direct threat regulation to excuse any requirement of accommodation here.

b. The officers' decision to reenter Sheehan's room did not violate their training or generally accepted police practices. Under California law, police officer training is standardized, and the California Department of Justice's Commission on Peace Officer Standards and Training (POST) develops training curricula for officers statewide, including training for encounters with the mentally ill. *See* Cal. Penal Code §§ 13500, 13510(a), 13515.25. Its curriculum for field contacts with people with mental illness states that "[o]fficers should never compromise or jeopardize

their own safety or the safety of others" in an encounter with someone with a mental illness. App. 2a.[2] "Once the scene is stabilized and there is no threat to life then the officer has a duty to reasonably accommodate the person's disability, but not before." *Id.* POST's curriculum also instructs officers in how to identify danger from someone who is mentally ill, by looking to factors such as "[t]he availability of any weapons to the person," "[s]tatements made by the person that suggest[ ] that he or she is prepared to commit a violent or dangerous act," and "[s]igns of violence at the scene." *Id.* at 2a-3a. Sheehan satisfied these criteria, and the officers acted in keeping with POST's guidance by treating Sheehan as dangerous and disarming her immediately rather than using de-escalation techniques.[3]

The officers' reentry also did not violate San Francisco Police Department General Order 8.02, requiring the use of hostage negotiators to deal with

---

[2] The section of POST's curriculum concerning field contacts with people with mental illness is set out in the Appendix to this brief as regulatory material. The curriculum is available in full for online purchase at https://www.post.ca.gov/student-workbooks.aspx.

[3] That de-escalation protocols do not supplant ordinary police practices for dealing with dangerous suspects should be no surprise. While these methods have proven helpful in connecting mentally ill people with services, they have not been consistently shown to reduce force incidents, or to reduce the severity of injuries when officers must resort to force, as *amici* on both sides of this case agree. *See* Nat'l League of Cities Br. 17-19; APA Br. 32.

barricaded suspects. A barricaded suspect is one who is armed, "takes up a defensive position" against the police, and "presents a deadly hazard to arresting officers." *Id.*[4] But contrary to Sheehan's assertion, Resp. Br. 34-35, while Holder called Sheehan a barricaded suspect in police radio communications, Holder clarified in a post-shooting interview her belief that Sheehan "wasn't barricaded." J.A. 14. Sheehan was not contained, and had not yet fortified herself or taken up a defensive position – but the prospect that she might do so, and become a deadly threat to the officers who would eventually have to extract her, was one reason that the officers decided to reenter the room immediately. *See* J.A. 198-99. In any event, the barricaded suspect policy is "meant to safeguard the police and other innocent parties, not the suspect," and so it is "irrelevant" as to whether the officers' conduct towards Sheehan was reasonable. *Scott v. Henrich*, 39 F.3d 912, 916 (9th Cir. 1994).

c. There is no triable issue whether the officers made a reasonable judgment that Sheehan presented a significant risk. Sheehan asserts that a jury could find that use of delay or crisis de-escalation techniques would have avoided a violent confrontation. But under the direct threat regulation, the proposed modifications must, as Sheehan concedes, "eliminate" any significant risk she posed. Resp. Br. 37; *see also* 28 C.F.R. §§ 35.104, 35.139(b). No reasonable jury

---

[4] The order is available at http://www.sf-police.org/modules/ShowDocument.aspx?documentid=14748.

could find that Sheehan's evidence satisfies that standard. Her police practices expert, Lou Reiter, opined that had Reynolds and Holder used de-escalation techniques and followed the SFPD's barricaded-suspect protocol, "the necessity to resort to the use of deadly force would likely not have occurred." J.A. 322. But Reiter has admitted that had Reynolds and Holder done what he claims was required by the policies – with one of them retreating from Sheehan's door to the bottom of the stairs, and the other going around to the back of the apartment building until additional units arrived – then they would have been unable to see Sheehan's door, unable to prevent her from attacking anyone who might have been upstairs, unable to prevent her from escaping in the time it took one of them to run to back of the building, and vulnerable if Sheehan shot at them from the top of the stairs. J.A. 364-66. That is not "eliminat[ion]" of the significant risks Sheehan posed.[5]

In employment cases, courts have not hesitated to decide that a potentially devastating risk that is

---

[5] Sheehan's own testimony accords with the officers' assessment of the risks, and the extent to which no modification would have eliminated them. Even years after the event, she testified not that her actions were the result of a temporary crisis but that she would not drop her knife because "[t]hey didn't drop their guns," J.A. 282, and she "planned to resist arrest," J.A. 284. The officers, of course, were not aware of these statements at the time and did not consider them as part of their risk assessment.

unlikely or hard to quantify is a significant risk as a matter of law, not a jury question. *See, e.g.*, *Donahue*, 224 F.3d at 230-31 (prospect that train dispatcher could pass out on the job at a time when other dispatchers were not present was significant risk); *EEOC v. Amego*, 110 F.3d 135, 141-42, 144-47 (1st Cir. 1997) (depressive employee who had previously attempted suicide with prescription drugs, at residence for disabled where drugs were dispensed, presented significant risk despite a letter from her psychiatrist that she could perform her duties). The same principle should apply here.

3. Regardless of whether Sheehan's dangerous conduct excused the officers from accommodating her under the direct threat regulation, delaying Sheehan's arrest or using special arrest protocols was not a reasonable accommodation here, and there is no need to remand for further consideration of this question.

a. Sheehan was not entitled to demand the officers' use of crisis de-escalation techniques in lieu of arresting her immediately. The government has a "paramount interest in ensuring public safety." *Scott v. Harris*, 550 U.S. 372, 383 (2007). When confronted with the possibility that violence is about to occur, police officers are not required to wait and "hope[ ] for the best." *Id.* at 385. Instead they are charged with "preventing violence and restoring order." *Brigham City, Utah v. Stuart*, 547 U.S. 398, 406 (2008). The accommodation that Sheehan seeks runs counter to these fundamentals of police conduct and amounts to a claim that the officers should

simply have assumed that she would calm down before she escaped or hurt someone. Because her proposed accommodation "takes no account of the legitimate governmental interest," *Washington v. Harper*, 494 U.S. 210, 226 (1990), in eliminating the danger she posed by taking her into custody immediately, it was not a reasonable accommodation. "A rule that is in no way responsive to the State's legitimate interests is not a proper accommodation, and can be rejected out of hand." *Id.* (considering mentally ill prisoner's due process right not to be forcibly medicated); *see also De Boise v. Taser Int'l, Inc.*, 760 F.3d 892, 899 (8th Cir. 2014) (unarmed mentally ill suspect, who had previously assaulted his mother and was behaving aggressively, was not entitled to any accommodation because of the "rapidly evolving circumstances" of his encounter with police); *Bircoll v. Miami-Dade County*, 480 F.3d 1072, 1085-86 (11th Cir. 2007) (exigency of DUI stop at 3 a.m., where "time is of the essence," rendered modification to deaf suspect's arrest unreasonable). Indeed, delay in the arrest of an armed and violent suspect who is not fully contained "alter[s] such an essential aspect" of police activity that it amounts to a fundamental alteration of that activity. *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 682 (2001); *see also* 28 C.F.R. § 35.130(b)(7).

b. The United States correctly notes that modifying arrest procedures for armed and violent suspects who are mentally ill "will not be reasonable in the run of cases" because "[a]rrests are a particularly

'dangerous and difficult' law enforcement activity," and because the exigencies surrounding such arrests will often mean that accommodations increase safety concerns. U.S. Br. 18-19 (quoting *Maryland v. Garrison*, 480 U.S. 79, 87 (1987)). The United States accordingly contends the Court should hold there is a presumption that no accommodation would be reasonable but permit a plaintiff to overcome the presumption by showing special circumstances. U.S. Br. 19-21; *see U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401-02 (2002). Petitioners agree that this presumption is appropriate and would reduce uncertainty for police officers operating under dangerous circumstances.

There is no reason, however, to remand this case for application of a new burden-shifting regime. Sheehan does not seek a remand. Resp. Br. 48-49. Instead, she contends she has carried any burden of showing special circumstances because, in her view, there are at least triable issues of fact that the exigency had abated when she closed her door on the officers, and that the officers did not follow their training in reentering the room. Resp. Br. 48-49. The Ninth Circuit has already considered both of these factors, *see* Pet. App. 27, 45, and it reached the wrong conclusions, *see supra* 6-11. Nothing in its opinion suggests that the allocation of burdens mattered to its analysis. Nor is this case like *Bragdon*, where the Court did not have the benefit of full briefing on the record question it identified for remand, 524 U.S. at 654, or like *Barnett*, where the Court identified new

factors for the parties' attention, 535 U.S. at 406; *id.* at 407-08 (Stevens, J., concurring) (noting gaps in the limited record before the Court).

c. Sheehan appears to argue for a dispositive rule that police officers who do not follow "generally accepted police practices" or department policies for encounters with the mentally ill have failed to offer reasonable accommodations. Resp. Br. 40-42. Petitioners agree that specialized training will often be relevant to questions about reasonable accommodations under Title II. Where a mentally ill person's behavior is erratic but not threatening, for example, an officer's failure to follow her training in recognizing and adapting her approach to the person's mental illness will likely be a proper factor in the reasonableness analysis.

But this Court has never held that the reasonableness of a proposed accommodation pivots on a single factor. *See, e.g.*, *Martin*, 532 U.S. at 688 ("individualized inquiry must be made to determine whether a specific modification for a particular person's disability would be reasonable under the circumstances"). It makes no sense to single out de-escalation protocols for dispositive treatment here, where the U.S. Department of Justice "has repeatedly issued guidance to assist law enforcement entities in complying with the ADA, including in the context of arrests," U.S. Br. 13, but has not issued guidance in

the techniques Sheehan or her expert endorses,[6] and where empirical analysis about the efficacy of these protocols is inconclusive, *see supra* n.3. Declining to adopt crisis de-escalation protocols as the standard for reasonableness for police encounters with people who are mentally ill will not, as some *amici* suggest, *see* ACLU Br. 29, impede the wider adoption of these beneficial policies among departments. Indeed, the contrary could be true. If the Court creates a presumption that officers have failed to reasonably accommodate disabled persons whenever they do not follow specialized training, departments may be less likely to offer extensive training for fear it will raise the standard for ADA compliance.

4. Sheehan also argues that the officers violated Title II because Reynolds decided to reenter her room "without taking her mental illness into account." Resp. Br. 24. As did the Ninth Circuit, Pet. App. 12, Sheehan infers disregard from the sergeant's testimony that, when she decided to reopen the door, "the disability became a secondary issue" because

---

[6] Indeed, the Department's existing guidance is in conspicuous tension with Sheehan's techniques when it informs officers that an accommodation for communicating with a deaf person may be delayed where the person is "threatening," U.S. Dep't of Justice, *Communicating with People Who Are Deaf or Hard of Hearing: ADA Guide for Law Enforcement Officers* (Jan. 2006), or where the officer has not yet "stabilize[d] the situation," U.S. Dep't of Justice, *Commonly Asked Questions About the Americans with Disabilities Act & Law Enforcement* § III (Apr. 4, 2006).

Sheehan had just attempted to kill two police officers, J.A. 235. But Reynolds's description aptly summarizes the direct threat defense, where disability becomes a secondary issue in a moment where significant danger cannot be neutralized, and her testimony cannot plausibly be read as expressing discriminatory animus.

5. Sheehan argues that the Court should dismiss the first question presented as improvidently granted because petitioners do not argue that Title II never applies to arrests. Resp. Br. 25. But the question petitioners presented for review is whether Title II requires accommodations for an armed, violent, mentally ill suspect. Pet. i. Petitioners' argument about that issue in *certiorari*-stage briefs turned on the direct threat regulation and the reasonableness of an accommodation for a violent suspect, Pet. 25-28, Pet. Reply 1, not on claims about the reach of Title II. Those issues continue to warrant this Court's review.

B. Reynolds and Holder are entitled to qualified immunity because they did not violate Sheehan's clearly established Fourth Amendment rights by reentering her room to arrest her

Sheehan argues that the officers' conduct in reentering her room violated the Fourth Amendment. Relying on the familiar Fourth Amendment balancing test, which weighs the government's interest against

an individual's interests to determine objective reasonableness, she contends that reentry was unlawful because the officers (1) lacked sufficient justification to reenter, and because the intrusion on her rights was too great in light of (2) the fact that they knew she would likely attack, and that they in turn might have to respond with deadly force, (3) their failure to use de-escalation techniques, and (4) their failure to account for her mental illness. Resp. Br. 18-19, 51-52. She further argues that the unlawfulness of their conduct was clearly established.

Her view of the Fourth Amendment is wrong under this Court's cases, which give weight only to *legitimate* personal interests in the Fourth Amendment balancing test, and do not treat police practices – however widely accepted – as the sole standard for reasonableness. As for Sheehan's mental illness, this Court has not yet addressed whether the presence of a suspect's mental illness alters the reasonableness balancing – such as, for example, by changing the culpability of her resistance. *See Graham*, 490 U.S. at 396 (reasonableness of force depends in part on "the severity of the crime at issue"). But regardless of the answer to that question, the Ninth Circuit erred in mistaking its isolated precedents, holding generally that "mental illness must be reflected in any assessment of the government's interest in the use of force," *Drummond v. City of Anaheim*, 343 F.3d 1052, 1058 (9th Cir. 2003) (quotation marks omitted), for a clearly established and specific rule that officers may

not take otherwise reasonable action against someone who is mentally ill and may resist.

1. The officers had ample justification to reenter Sheehan's room after their attempt to transport Sheehan for psychiatric treatment was thwarted by her attack. The emergency that undergirded their initial entry continued, and a brief interruption in an officer's lawful search does not require a new justification for reentry. *Michigan v. Tyler*, 436 U.S. 499, 511 (1978). Sheehan argues that the continuous-search exception did not apply here because the officers' subjective motivation for entry had changed; "the officers did not [re]enter to provide aid" but rather to arrest her. Resp. Br. 19 n.4. That argument runs headlong into this Court's recent admonition that "even if [officers'] subjective motives could be so neatly unraveled," it does not matter for purposes of the Fourth Amendment "whether the officers entered to arrest respondents or to assist the injured," so long as their entry was objectively reasonable. *Stuart*, 547 U.S. at 404-05; *see also Devenpeck v. Alfor* 543 U.S. 146, 153 (2004). Moreover, after Sheehan's attack, the officers could lawfully enter for the additional reason that they now had a reasonable basis to believe that Sheehan might commit further violence. *See Mincey v. Arizona*, 437 U.S. 385, 392-93 (1978); *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 299 (1967); *see also* Petrs. Br. 43-46.

2. The fact that a suspect is foreseeably likely to use force to resist a lawful entry is entitled to

no weight in the Fourth Amendment balancing test. The Fourth Amendment weighs legitimate government interests against an individual's interests in "privacy, dignity, and security of [her] person[]." *See Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 613-14 (1989). But, as petitioners explained in their opening brief, this Court has rejected giving any weight to *illegitimate* personal interests. Petrs. Br. 44-45, 50-54. Instead, the Fourth Amendment accords weight only to private interests that "society has recognized as reasonable." *Skinner*, 489 U.S. at 617; *see also Georgia v. Randolph*, 547 U.S. 103, 111 (2006). There is no reasonable personal interest in thwarting or evading legitimate police activity, and accordingly this Court has never held a Fourth Amendment intrusion unreasonable in light of such interests. *See* Petrs. Br. 44-45; U.S. Br. 29-30. Sheehan offers no response to this argument.

3. Similarly, Sheehan's allegation that the officers used tactics contrary to generally accepted police practices does not compel the conclusion that the officers' reentry was unlawful under the Fourth Amendment. *See Kentucky v. King*, ___ U.S. ___, 131 S. Ct. 1849, 1859 (2011). Sheehan also casts the use of generally accepted police practices as a matter of "efficacy," making the roundabout argument that generally accepted police practices establish what is effective, and what is not effective cannot be reasonable. Resp. Br. 16-17. But there is no empirical evidence in the record that these practices are effective,

much less so effective that any other practice is unreasonable. *See supra* n.3. In any event, it was not so clearly established as to be "beyond debate" that police officers must use crisis de-escalation techniques in encounters like this one in order to avoid liability for Fourth Amendment violations. *See Ashcroft v. al-Kidd*, ___ U.S. ___, 131 S. Ct. 2074, 2083 (2011).

4. Sheehan finally argues that the officers' conduct was unreasonable because, despite knowing that she was mentally ill, they did not take into account her illness in deciding to reenter her room immediately. This Court's cases do not directly address this question, and Sheehan cites none. Instead, she relies on three Ninth Circuit cases that, as petitioners noted in their opening brief, address mental illness in easily distinguished factual contexts. Petrs. Br. 49. The only Ninth Circuit case that bears even remote resemblance to this one is *Alexander v. City & County of San Francisco*, where the court held that officers who had an administrative warrant to search a home violated the Fourth Amendment when they made a warrantless entry to arrest the occupant, and that they were consequently liable for the foreseeable use of deadly force against the mentally ill occupant, who responded violently to the entry. 29 F.3d 1355, 1358, 1360, 1363-67 (9th Cir. 1994). That case involved no exigent circumstances, *id.* at 1365 n.11, in contrast to this case, and *Alexander*'s provocation holding has been expressly limited by the Ninth Circuit to cases where the officers' entry independently

violated the Fourth Amendment, *see Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002). Here, the officers' entry was lawful under exceptions to the warrant requirement. Pet. App. 23-25.[7]

5. The United States contends that because the role of mental illness in Fourth Amendment analysis presents a novel question, this Court should decide the second question presented solely on the basis of the "clearly established" prong of qualified immunity analysis rather than with a decision on whether Reynolds and Holder violated Sheehan's Fourth Amendment right. U.S. Br. 32-34. Here, the danger Sheehan presented was so clear and imminent that, just as the officers were not required by the Americans with Disabilities Act to desist from arresting her, neither were they so required by the Fourth Amendment. But petitioners agree with the United States that a complete account of the role of mental illness in Fourth Amendment analysis – which may be at issue in a variety of police encounters in widely differing factual contexts – is a novel question, and the Court may wish further development of the law here before providing guidance to lower courts on this issue.[8] The remaining errors in the Ninth

---

[7] Sheehan also argues that the officers used unreasonable force in the moment of the shooting. Resp. Br. 19-20. The Ninth Circuit decided that issue against her, Pet. App. 37, and she did not seek further review.

[8] Petitioners disagree, however, that the second question presented does not "fairly include[ ]" the issue of whether the officers violated Sheehan's Fourth Amendment rights. *See* S. Ct.

(Continued on following page)

Circuit's analysis – such as aspects of its opinion that appear to countenance foreseeable resistance as a reason to desist from entry even where a suspect is not mentally ill, *see, e.g.*, Pet. App. 37-38 – are so plain that there is no benefit to refraining from addressing those errors as a matter of Fourth Amendment law. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

* * *

Rule 14.1(a). That question is "easily subsumed" within the question presented, because a Fourth Amendment right cannot be clearly established if it is not a right at all – and the parties' briefs reflect that the two issues are "intimately bound up" together. *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 540 (1999) (question of what circumstances allowed an award of punitive damages for employment discrimination included the proper legal standard for imputing vicarious liability to employer).

For the foregoing reasons and those stated in petitioners' opening brief, the judgment of the court of appeals against petitioners as to the Title II and Fourth Amendment claims should be reversed.

Respectfully submitted,

SAN FRANCISCO CITY
ATTORNEY'S OFFICE
DENNIS J. HERRERA
City Attorney
CHRISTINE VAN AKEN
Chief of Appellate Litigation
PETER J. KEITH, *Counsel of Record*
Deputy City Attorney
1390 Market Street, 7th Floor
San Francisco, CA 94102
(415) 554-3908
peter.keith@sfgov.org

Counsel for Petitioners

CALIFORNIA COMMISSION ON PEACE OFFICER STANDARDS AND TRAINING

Basic Course
Workbook Series
Student Materials
Learning Domain 37
People with Disabilities
Version 5.1

---

* * *

LD 37: Chapter 4 – Persons with Mental Illness

* * *

[4-14] **Persons with Mental Illness – Field Contacts**

[37.04.EO14, 37.04.EO15]

Introduction Officers must make difficult judgments and decisions about the behaviors and intent of any individual they think may be affected by a mental illness. This requires special considerations to avoid unnecessary violence or civil liability.

Officer safety

People affected by mental illness can be unpredictable and sometimes violent. Officers should never compromise or jeopardize their own safety or the safety of others when dealing with individuals who display symptoms of a mental illness.

Once the scene is stabilized and there is no threat to life then the officer has a duty to reasonably accommodate the person's disability, but not before.

Indicators

Not all people with mental illness are dangerous, while some may represent danger only under certain circumstances or conditions. Some may be capable of going very quickly from a state of calm to being extremely agitated.

There are many indicators that officers may use to help determine if people who appear to be affected by mental illness are dangerous to others or themselves.

- The availability of any weapons to the person
- Statements made by the person that suggests that he or she is prepared to commit a violent or dangerous act. These could range

from subtle innuendos to direct threats

- A personal history of prior violent acts under similar or related conditions. Information may come from a previous law enforcement contact or others familiar with that person
- Signs of violence at the scene prior to the officer arriving
- Officers shall consider statements made by a credible third party indicating that the subject may be prepared to commit a violent or dangerous act

[4-15]

- The amount of self-control the person is able to demonstrate. This can include signs of rage, anger, fright or agitation. Signs of lack of control can include an inability to sit or stand still, wide eyes, rambling speech, etc.
- Begging to be left alone or offering frantic assurances that one is fine may also suggest that a person is close to losing control.

Suicide awareness

There are several factors that may help officers determine how serious a threat is. Officers should ask:

- if the person has the intent, a plan, or the means to carry out the act of attempting suicide
- if he or she has made previous attempts to commit suicide
- the method used in a previous attempt
- about knowledge and/or history of someone who has completed suicide
- individuals close to the person about the person's history and mental state

NOTE: Excessive use of alcohol and/or other drugs can markedly increase the danger of a person successfully attempting suicide.

NOTE: Officers are responsible for knowing and complying with specific policies and guidelines regarding contacts with individuals who may be suicidal.

[4-16]
Field contacts

The following table identifies appropriate tactical actions officers should be aware of.

Action	Additional Information
Request Backup	• Situation can be unpredictable and escalate quickly
Stabilize the scene	• Once the scene is stabilized and there is no threat to life then the officer has a duty to reasonably accommodate the person's disability, but not before
Calm the Situation	• Take time to assess the situation • Provide reassurance that officers are there to help • If possible give the person time to calm down • Move slowly • When possible, eliminate emergency lights and sirens and disperse any crowd that may have gathered • Reduce environmental distractions such as radio or television noise

		• Assume a quiet non-threatening manner when approaching and conversing with the individual • If possible, avoid physical contact if no violence or destructive acts have taken place • If possible, explain intended actions before taking action
[4-17]	**Communicate**	• Keep sentences short • Determine if the person is taking medication • Talk with the individual in an attempt to determine what is bothering that person • Acknowledge the person's feelings • Ask the person if he or she is hearing voices and, if so, what they are saying • Avoid topics that may agitate the person

	• Guide the conversation toward subjects that will bring the individual back to reality (e.g., where are you?, day of the week?) • Allow time for the person to consider questions and be prepared to repeat them • Do not mock the person or belittle his or her behavior • Do not agree or disagree with the delusions or hallucinations, but validate the feelings (i.e. "It must be frustrating for you to feel this way.")
Do Not Make Threats	• Do not threaten the individual with arrest or in any other manner • Threats may create additional fright, stress, or potential aggression

Be Truthful	• If the individual becomes aware of deception, that person may: – withdraw from any contact in distrust – become hypersensitive – retaliate in anger

* * *

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
JAN 16 2015
OFFICE OF THE CLERK

No. 13-1412

In the Supreme Court of the United States

CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, ET AL., PETITIONERS

v.

TERESA SHEEHAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING VACATUR IN PART AND REVERSAL IN PART

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
JOYCE R. BRANDA
VANITA GUPTA
Acting Assistant Attorneys General
IAN HEATH GERSHENGORN
Deputy Solicitor General
ELIZABETH B. PRELOGAR
Assistant to the Solicitor General
BARBARA L. HERWIG
SHARON M. MCGOWAN
DANA KAERSVANG
HOLLY A. THOMAS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the anti-discrimination provision of Title II of the Americans with Disabilities Act, 42 U.S.C. 12132, requires a law enforcement entity to modify its practices when arresting an individual with a disability who is armed and violent.

2. Whether in 2008 it was clearly established that the Fourth Amendment prohibited police officers from making an otherwise lawful entry under the emergency aid and exigent circumstances exceptions to the warrant requirement to arrest an armed and violent individual known to have mental illness due to the individual's foreseeable resistance.

TABLE OF CONTENTS

Page

Interest of the United States 1
Constitutional, statutory, and regulatory provisions involved 2
Statement 2
Summary of argument 7
Argument:
I. The Americans with Disabilities Act applies to law enforcement activities and requires reasonable modifications, but does not ordinarily require police officers to alter their procedures when arresting an individual with a disability who is armed and violent 9
A. Title II applies to all law enforcement activities, including arrests 10
B. Title II requires law enforcement entities to make reasonable modifications when arresting an individual with a disability 14
C. When police officers arrest a suspect with a disability who is armed and violent, a modification ordinarily will not be reasonable due to safety concerns 17
D. The case should be remanded for application of this ADA standard 21
II. Petitioner officers are entitled to qualified immunity because they did not violate a clearly established Fourth Amendment right 22
Conclusion 35
Appendix — Constitutional, statutory and regulatory provisions 1a

TABLE OF AUTHORITIES

Cases: Page

ABF Freight Sys., Inc. v. *NLRB*, 510 U.S. 317 (1994) 14
Alexander v. *City & Cnty. of S.F.*, 29 F.3d 1355 (9th Cir. 1994), cert. denied, 513 U.S. 1083 (1995) 31, 32
Anderson v. *Creighton*, 483 U.S. 635 (1987) 22, 23
Ashcroft v. *al-Kidd*, 131 S. Ct. 2074 (2011) 24, 31
Bircoll v. *Miami-Dade Cnty.*, 480 F.3d 1072 (11th Cir. 2007) 15
Bivens v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) 1
Bragdon v. *Abbott*, 524 U.S. 624 (1998) 11, 14, 16, 17, 22
Brigham City v. *Stuart*, 547 U.S. 398 (2006) 29
Brosseau v. *Haugen*, 543 U.S. 194 (2004) 24, 25, 31
Buchanan v. *Maine*, 469 F.3d 158 (1st Cir. 2006) 30, 33
Calloway v. *Boro of Glassboro Dep't of Police*, 89 F. Supp. 2d 543 (D.N.J. 2000) 15
Camreta v. *Greene*, 131 S. Ct. 2020 (2011) 32
Chevron U.S.A. Inc. v. *NRDC, Inc.*, 467 U.S. 837 (1984) 14
Dadian v. *Village of Wilmette*, 269 F.3d 831 (7th Cir. 2001) 18
Deorle v. *Rutherford*, 272 F.3d 1272 (9th Cir. 2001), cert. denied, 536 U.S. 958 (2002) 32
Gorman v. *Bartch*, 152 F.3d 907 (8th Cir. 1998) 15
Graham v. *Connor*, 490 U.S. 386 (1989) 27
Hainze v. *Richards*, 207 F.3d 795 (5th Cir.), cert. denied, 531 U.S. 959 (2000) 5

Cases—Continued: Page

Hope v. *Pelzer*, 536 U.S. 730 (2002) 2, 22, 31
Hunter v. *Bryant*, 502 U.S. 224 (1991) 23, 27
Johnson v. *City of Saline*, 151 F.3d 564 (6th Cir. 1998) 14
Maryland v. *Garrison*, 480 U.S. 79 (1987) 18
Menuel v. *City of Atlanta*, 25 F.3d 990 (11th Cir. 1994) 30
Messerschmidt v. *Millender*, 132 S. Ct. 1235 (2012) 23
Michigan v. *Fisher*, 558 U.S. 45 (2009) 25
Michigan v. *Tyler*, 436 U.S. 499 (1978) 26
Pearson v. *Callahan*, 555 U.S. 223 (2009) 9, 32, 33, 34
Pennsylvania Dep't of Corr. v. *Yeskey*, 524 U.S. 206 (1998) 7, 10, 11
Plakas v. *Drinski*, 19 F.3d 1143 (7th Cir.), cert. denied, 513 U.S. 820 (1994) 30
Reichle v. *Howards*, 132 S. Ct. 2088 (2012) 23, 24, 32
Robertson v. *Las Animas Cnty. Sheriff's Dep't*, 500 F.3d 1185 (10th Cir. 2007) 21
Ryburn v. *Huff*, 132 S. Ct. 987 (2012) 26, 27
Safford Unified Sch. Dist. No. 1 v. *Redding*, 557 U.S. 364 (2009) 24
Saucier v. *Katz*, 533 U.S. 194 (2001) 25
Schorr v. *Borough of Lemoyne*, 243 F. Supp. 2d 232 (M.D. Pa. 2003) 16
Schulz v. *Long*, 44 F.3d 643 (8th Cir. 1995) 30
Scott v. *Harris*, 550 U.S. 372 (2007) 27, 28, 29, 34
Seremeth v. *Board of Cnty. Comm'rs*, 673 F.3d 333 (4th Cir. 2012) 15
Terry v. *Ohio*, 392 U.S. 1 (1968) 18
United States v. *Gonzales*, 520 U.S. 1 (1997) 10

Cases—Continued: Page

US Airways, Inc. v. *Barnett*, 535 U.S. 391 (2002) 8, 17, 18, 19, 20, 22
Waller v. *City of Danville*, 556 F.3d 171 (4th Cir. 2009) 19
Warden v. *Hayden*, 387 U.S. 294 (1967) 29
Wilson v. *Layne*, 526 U.S. 603 (1999) 23, 24
Wood v. *Moss*, 134 S. Ct. 2056 (2014) 33

Constitution, statutes and regulations:

U.S. Const. Amend. IV ..... *passim*, 1a
Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (42 U.S.C. 12101 *et seq.*) 1
Tit. I 18
42 U.S.C. 12101(b)(1) 9
42 U.S.C. 12111-12117 9
42 U.S.C. 12112(b)(5)(A) 18
Tit. II ..... *passim*
42 U.S.C. 12131-12134 9
42 U.S.C. 12131-12165 10
42 U.S.C. 12131(1)(A) 10, 3a
42 U.S.C. 12131(1)(B) 10, 3a
42 U.S.C. 12132 ..... 7, 10, 11, 4a
42 U.S.C. 12134(a) 12
42 U.S.C. 12141-12165 9
Tit. III:
42 U.S.C. 12181-12189 9
Tit. IV:
42 U.S.C. 12201(a) 11
42 U.S.C. 12206 12

Statutes and regulations—Continued: Page

Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (29 U.S.C. 701 *et seq.*) 11
29 U.S.C. 794(b) (§ 504) 11
18 U.S.C. 241 2
18 U.S.C. 242 2
42 U.S.C. 1983 ..... 1, 2, 4, 3a
Cal. Welf. & Inst. Code § 5150 (West Supp. 2014) 3
28 C.F.R.:
Pt. 35:
Section 35.104 17
Section 35.130(b)(7) 14, 18, 21, 5a
Section 35.130(h) 17
Section 35.139(a) 17, 21, 5a
Section 35.190(b)(6) 13
App. B 13

Miscellaneous:
136 Cong. Rec.:
(1990):
p. 11,461 12
(daily ed. June 13, 1990):
p. E1913 12
p. E1916 12
56 Fed. Reg. 35,703 (July 26, 1991) 13
H.R. Rep. No. 485, 101st Cong., 2d Sess. (1990):
Pt. 2 11
Pt. 3 11
The Random House Dictionary of the English Language (2d ed. 1987) 11

Miscellaneous—Continued: Page

U.S. Dep't of Justice:

Americans with Disabilities Act: Title II Technical Assistance Manual Covering State and Local Government Programs and Services (Nov. 1993 & Supp. 1994) 13, 14, 17

Commonly Asked Questions About the Americans with Disabilities Act and Law Enforcement (Apr. 4, 2006), http://www.ada.gov/q&a_law.htm 13, 14, 15, 16, 19

Communicating with People Who Are Deaf or Hard of Hearing: ADA Guide for Law Enforcement Officers (Jan. 2006), http://www.ada.gov/lawenfcomm.htm 14

Webster's Third New International Dictionary (1986) 11

In the Supreme Court of the United States

No. 13-1412

CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, ET AL., PETITIONERS

v.

TERESA SHEEHAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING VACATUR IN PART AND REVERSAL IN PART

INTEREST OF THE UNITED STATES

This case concerns how Title II of the Americans with Disabilities Act of 1990 (ADA), Pub. L. No. 101-336, 104 Stat. 327 (42 U.S.C. 12101 *et seq.*), applies to the arrest of an individual with a disability. The Justice Department has responsibility for the implementation and enforcement of Title II, and the Department has issued regulations and interpretive guidance that bear on the ADA issue.

The case also presents the question whether police officers violated clearly established Fourth Amendment law by making a warrantless entry and using force to arrest an individual known to have mental illness. The same qualified-immunity principles that apply under 42 U.S.C. 1983 apply in civil actions against federal officials under *Bivens* v. *Six Unknown*

Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). In addition, the standard for determining whether a right is "clearly established" for qualified-immunity purposes is identical to the standard for deciding whether a criminal defendant charged under 18 U.S.C. 241 or 242 had "fair warning" that she was violating a constitutional right. See *Hope* v. *Pelzer*, 536 U.S. 730, 740 (2002).

For these reasons, the United States has a substantial interest in the Court's disposition of this case.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The pertinent constitutional, statutory, and regulatory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-5a.

STATEMENT

This case concerns the arrest of respondent, an individual who has mental illness, in 2008. Police officers entered respondent's room without a warrant and shot her after she advanced toward them brandishing a knife. Respondent survived and brought suit under 42 U.S.C. 1983, raising claims under the ADA and the Fourth Amendment. See Pet. App. 3-4.

1. Respondent, who has schizoaffective disorder, lived in a San Francisco group home for people with mental illness. Br. in Opp. 1. On August 7, 2008, her social worker, Heath Hodge, entered her room to perform a welfare check. Pet. App. 7. Respondent reacted violently, threatening to kill Hodge with a knife. *Id.* at 8. Hodge retreated, cleared the building of residents, and called the San Francisco Police Department for assistance in transporting respondent to a mental health facility for psychiatric treatment

under Cal. Welf. & Inst. Code § 5150 (West Supp. 2014). Pet. App. 7.

Officers Katherine Holder and Kimberly Reynolds responded to the call. Pet. App. 8. The dispatch information stated that respondent "is known to make violent threats" and had "told reporting party to get out or she'll knife him (no weapon seen)." *Ibid.* When the officers arrived, Hodge described his confrontation with respondent and showed them a Section 5150 application for her detention. *Id.* at 8-9. The application stated that respondent had been off her psychotropic medicine for more than a year and had recently shown increased symptoms. *Id.* at 9. Respondent reportedly had stopped eating, had been wearing the same clothing for several days, and had been coming and going at odd hours. *Ibid.* The application described how respondent had violently yelled at Hodge, "I have a knife and I'll kill you if I have to!" *Id.* at 10. Hodge had checked boxes on the application indicating that respondent was gravely disabled and a danger to others, but he did not check the box stating that respondent was a danger to herself. *Ibid.*

The officers decided to take respondent into custody. Pet. App. 10. Hodge told them the building was clear of residents and that the only access to respondent's second-story room was through the door or through a window with the use of a ladder. *Id.* at 9. The officers knocked on respondent's door, announced they were police officers, and entered using a key. *Id.* at 10. After they entered, respondent came toward them, holding a knife and threatening to kill them. *Id.* at 11-12. The officers retreated to the hallway and respondent closed the door. *Id.* at 12.

The officers called for backup, then drew their weapons and a container of pepper spray and forced respondent's door open again. Pet. App. 12-13. Sergeant Reynolds later explained that they decided to enter immediately to ensure officer safety and to prevent respondent from escaping. *Id.* at 12. Sergeant Reynolds stated that "the threat became more scary" with the door closed because they did not know whether respondent "had an avenue of escape" or access to "other weapons." *Ibid.* Sergeant Reynolds also stated that she was not "100 percent sure that [the] place was clear" and was concerned that "somebody could have been in there" with respondent. J.A. 47. The officers did not consider respondent's mental illness when they made the second entry. Pet. App. 12.

When the door opened, respondent immediately advanced toward the officers with the knife raised, forcing them into the hallway. Pet. App. 13. Sergeant Reynolds used the pepper spray, but it did not stop respondent. *Ibid.* When respondent continued to approach, the officers shot her. *Ibid.* Respondent was so close that Officer Holder "was forced to fire from the hip to prevent [respondent] from cutting her arm." *Ibid.*

Respondent survived and was subsequently prosecuted for assaulting a police officer with a deadly weapon and making criminal threats. Pet. App. 14. The jury hung on the assault charges and acquitted her on the threats count. *Id.* at 15. The city elected not to retry her. *Ibid.*

Respondent then filed this action under 42 U.S.C. 1983 against the officers and the City and County of

San Francisco, alleging, *inter alia*, violations of the ADA and the Fourth Amendment.

2. The district court granted summary judgment to petitioners. Pet. App. 55-81.

a. On the ADA claim, the district court held that the ADA does not apply to on-the-street police activity "prior to the officer's securing the scene and ensuring that there is no threat to human life." Pet. App. 79 (quoting *Hainze* v. *Richards*, 207 F.3d 795, 801 (5th Cir.), cert. denied, 531 U.S. 959 (2000)). Because the officers here were "attempt[ing] to detain a violent, mentally disabled individual under exigent circumstances," the court ruled that "[i]t would be unreasonable to ask [them] * * * to first determine whether their actions would comply with the ADA before protecting themselves and others." *Id.* at 79-80.

b. On the Fourth Amendment claim, the district court held that exigent circumstances justified the officers' warrantless entries into respondent's room and that their use of force was reasonable. The initial entry was permissible because "the officers had an objectively reasonable basis for believing that [respondent] was in need of immediate aid." Pet. App. 70. The second entry was justified because the emergency continued and indeed was heightened by the risk that respondent might escape, hurt herself, or harm others. *Id.* at 71. The court also concluded that "the officers' use of force was objectively reasonable" given the "dire and escalating threat" they faced. *Id.* at 73, 77.

3. The court of appeals vacated the district court's judgment in relevant part and remanded. Pet. App. 1-48.

a. The court of appeals held that the ADA "applies to arrests, though * * * exigent circumstances inform the reasonableness analysis." Pet. App. 43. The court reasoned that summary judgment was improper on respondent's failure-to-accommodate claim because a jury "could find that the situation had been defused sufficiently, following the initial retreat from [respondent's] room, to afford the officers an opportunity to wait for backup and to employ less confrontational tactics." *Id.* at 45.

b. The court of appeals further ruled that summary judgment was inappropriate on the Fourth Amendment claim. The court held that, although the warrantless entries were permissible and the shooting was justified when it occurred, "a reasonable jury could find that the officers' decision to force a confrontation" by entering respondent's room the second time "was objectively unreasonable." Pet. App. 28. The court emphasized that respondent "was in a confined area and not a threat to others—so long as [the officers] did not invade her home." *Id.* at 29. Thus, although "the officers were permitted to act without a warrant at the time of the second entry," respondent could pursue her Fourth Amendment claim on the theory that the officers acted unreasonably by "caus[ing] a violent—and potentially deadly—confrontation with a mentally ill person without a countervailing need." *Id.* at 23, 31. The court further found that the constitutional violation was clearly established because "[i]f there was no pressing need to rush in, and every reason to expect that doing so would result in [respondent's] death or serious injury, then any reasonable officer would have known that this use of force was excessive." *Id.* at 33.

c. Judge Graber dissented from the qualified immunity holding. Pet. App. 48-54. She emphasized that the officers did not need a warrant to make the second entry, *id.* at 48-52, and that the use of force was reasonable given the officers' "need to resolve an ongoing emergency that involved a deadly weapon," *id.* at 52.

SUMMARY OF ARGUMENT

I. A. Title II of the ADA applies to all law enforcement activities, including arrests. Title II broadly covers all public entities and prohibits disability discrimination with respect to all of their services, programs, and activities. 42 U.S.C. 12132; see *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 209 (1998). By its plain terms, the provision therefore extends to arrests. The ADA's legislative history and the Justice Department's implementing regulations and interpretive guidance confirm this reading.

B. To comply with Title II during an arrest, public entities must make reasonable modifications to accommodate an individual's disability. However, the exigencies surrounding police activity can play a significant role in determining whether a modification is reasonable. If objective evidence shows that a modification raises significant safety concerns, it will not qualify as reasonable and so need not be provided under the ADA.

C. When police officers arrest an individual with a disability who is armed and violent, any deviation from ordinary law enforcement tactics will generally present very real safety risks. Thus, in the run of cases involving this type of arrest situation, the ADA will not require a modification. A plaintiff nevertheless should remain free to show that special circumstances rendered a modification reasonable on the

particular facts. See *US Airways, Inc.* v. *Barnett*, 535 U.S. 391, 401, 403-405 (2002).

D. In this case, respondent was armed and violent when police officers attempted to arrest her. She therefore bore the burden of demonstrating that a modification would not have presented significant safety concerns for the officers or others. The case should be remanded for the court of appeals to analyze the summary judgment record under this framework.

II. Petitioner officers are entitled to qualified immunity on respondent's Fourth Amendment claim because they violated no clearly established law.

A. As the court of appeals correctly recognized, the officers were permitted to enter respondent's room under well-established exceptions to the warrant requirement, and their use of force was reasonable at the moment it occurred. The court nevertheless held that respondent's Fourth Amendment claim could proceed on the theory that the officers were liable for provoking the violent confrontation. Thus, framing the right at the appropriate level of specificity, the qualified immunity question is whether in 2008 it was clearly established that the Fourth Amendment prohibited officers from making an otherwise lawful entry under the emergency aid and exigent circumstances exceptions to arrest an armed and violent individual known to have mental illness due to the individual's foreseeable resistance.

No decision from this Court or the courts of appeals at the relevant time clearly established such a right. The decisions the Ninth Circuit relied on to deny qualified immunity are cast at a high level of generality or easily distinguished on their facts.

B. This case does not provide an appropriate vehicle to consider whether or under what circumstances officers can be liable for provoking a violent response from an individual who has mental illness. See *Pearson* v. *Callahan*, 555 U.S. 223, 236-243 (2009). Petitioners did not seek review of the court of appeals' constitutional ruling, and they have not briefed that issue in this Court. Moreover, the Fourth Amendment issue is heavily fact-dependent and its resolution is unlikely to serve a useful law-elaboration purpose. Finally, the constitutional issue presents novel and potentially difficult questions concerning whether an officer's knowledge of a suspect's mental illness affects the Fourth Amendment analysis. In contrast, this Court easily can—and should—conclude that the officers violated no clearly established right.

ARGUMENT

I. THE AMERICANS WITH DISABILITIES ACT APPLIES TO LAW ENFORCEMENT ACTIVITIES AND REQUIRES REASONABLE MODIFICATIONS, BUT DOES NOT ORDINARILY REQUIRE POLICE OFFICERS TO ALTER THEIR PROCEDURES WHEN ARRESTING AN INDIVIDUAL WITH A DISABILITY WHO IS ARMED AND VIOLENT

Congress enacted the ADA in 1990 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). The ADA broadly covers, and prohibits discrimination in, both private and public activity, including employment, 42 U.S.C. 12111-12117, public accommodations, 42 U.S.C. 12181-12189, public transportation, 42 U.S.C. 12141-12165, and, as relevant here, the full range of activities conducted by public entities, 42 U.S.C. 12131-12134.

Title II of the ADA, 42 U.S.C. 12131-12165, prohibits a "public entity" from discriminating against a "qualified individual with a disability." 42 U.S.C. 12132. This case concerns how Title II's anti-discrimination mandate applies to law enforcement entities when they arrest an individual with a disability who is armed and violent.

A. Title II Applies To All Law Enforcement Activities, Including Arrests

1. The starting point in determining the ADA's applicability to law enforcement operations is, as always, the statutory text. See *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 209 (1998). Title II's anti-discrimination provision provides that no individual with a disability "shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132.[1] The statute defines "public entity" to include "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. 12131(1)(A) and (B).

By its plain terms, Title II applies to all governmental entities, including law enforcement agencies. Title II uses the term "any" in its ordinary "expansive" sense, *i.e.*, "one or some indiscriminately of whatever kind." *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (citation omitted). Moreover, the statutory

---

[1] Because Title II applies only to entities, it does not authorize individual liability for damages. See Pet. App. 78 ("[S]ection 12132 does not permit suits against private individuals.").

text contains no "exception that could cast the coverage of" law enforcement entities "into doubt." *Yeskey*, 524 U.S. at 209. Accordingly, law enforcement agencies fall within the ADA's comprehensive definition of a public entity.

The statutory text further demonstrates that law enforcement entities are subject to Title II's anti-discrimination mandate with respect to all of their operations, including arrests. The reference to "services, programs, or activities," 42 U.S.C. 12132, is an all-inclusive phrase that covers everything a public entity does. See, *e.g.*, *The Random House Dictionary of the English Language* 20 (2d ed. 1987) (defining "activity" as "a specific deed, action, function, or sphere of action"); *Webster's Third New International Dictionary* 1812 (1986) (defining "program" as "a plan of procedure: a schedule or system under which action may be taken toward a desired goal").[2] And the statute further protects individuals with disabilities from being "subjected to discrimination," 42 U.S.C. 12132, which can occur during any aspect of an individual's interaction with a public entity. The statute therefore extends to all law enforcement operations, including arrests. See Pet. Br. 34 ("There is no claim that an

---

[2] Notably, Congress expressly defined the term "[p]rogram or activity" in Section 504 of the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (29 U.S.C. 701 *et seq.*), which served as the model for Title II, to "mean[] all of the operations of" a covered entity. 29 U.S.C. 794(b). Because Congress directed that Title II should not "be construed to apply a lesser standard than the standards applied under" Section 504, 42 U.S.C. 12201(a), the phrase "service, programs, or activities" carries a similarly broad meaning under the ADA. See *Bragdon* v. *Abbott*, 524 U.S. 624, 631-632 (1998).

arrest is not one of the 'services, programs, or activities' of a public entity under 42 U.S.C. 12132.").

2. The legislative history confirms that Congress contemplated that Title II would apply to law enforcement operations generally, and to arrests in particular. The House Report specified that Title II's anti-discrimination mandate would "extend[] * * * to *all* actions of state and local governments." H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 84 (1990) (emphasis added). The report further singled out arrests as an example of an activity where "discriminatory treatment based on disability can be avoided by proper training." *Id.* Pt. 3, at 50. In addition, legislators emphasized that Title II would address discrimination in law enforcement, including the arrest of individuals with disabilities. See, *e.g.*, 136 Cong. Rec. 11,461 (1990) ("Many times, deaf persons who are arrested are put in handcuffs. But many deaf persons use their hands to communicate. * * * [T]hese mistakes * * * constitute discrimination."); *id.* at E1913, E1916 (daily ed. June 13, 1990) ("[P]ersons who have epilepsy are sometimes inappropriately arrested because police officers have not received proper training to recognize seizures and to respond to them."). Congress thus expected and intended Title II to cover all law enforcement operations in accordance with the statute's plain text.

3. The administrative implementation of Title II also supports this reading. Pursuant to an express delegation from Congress, the Justice Department has authority to promulgate regulations implementing Title II and the responsibility to provide technical assistance to public entities concerning ADA compliance. 42 U.S.C. 12134(a), 12206. The Department has

construed Title II to "appl[y] to anything a public entity does." 28 C.F.R. Pt. 35, App. B; see *ibid.* ("All governmental activities of public entities are covered."). In particular, the Department oversees the implementation of Title II with respect to "[a]ll programs, services, and regulatory activities relating to law enforcement." 28 C.F.R. 35.190(b)(6). And the Department has further stated that "[t]he general regulatory obligation to modify policies, practices, or procedures requires law enforcement to make changes in policies that result in discriminatory arrests or abuse of individuals with disabilities." 56 Fed. Reg. 35,703 (July 26, 1991).

Consistent with this interpretation, the Department has repeatedly issued guidance to assist law enforcement entities in complying with the ADA, including in the context of arrests. For example, the Department's Title II Technical Assistance Manual states that "[a] municipal police department encounters many situations where effective communication with members of the public who are deaf or hard of hearing is critical," including "interviewing suspects prior to arrest," and "interrogating arrestees." U.S. Dep't of Justice, *Americans with Disabilities Act: Title II Technical Assistance Manual Covering State and Local Government Programs and Services* § II-7.1000(B), illus. 3, at 5 (Nov. 1993 & Supp. 1994) (*Title II Technical Assistance*). In addition, 2006 guidance states that "[t]he ADA affects virtually everything that officers and deputies do," including "arresting, booking, and holding suspects." U.S. Dep't of Justice, *Commonly Asked Questions About the Americans with Disabilities Act and Law Enforcement* § I (Apr. 4, 2006) (*2006 Guidance*).

Because Congress expressly vested the Department with authority to implement the ADA through regulations and technical assistance, the Department's interpretation of Title II must be accorded "controlling weight unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'" *ABF Freight Sys., Inc.* v. *NLRB*, 510 U.S. 317, 324 (1994) (quoting *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 844 (1984)); see *Bragdon* v. *Abbott*, 524 U.S. 624, 646 (1998) (recognizing that "the Department's views are entitled to deference"); *Johnson* v. *City of Saline*, 151 F.3d 564, 570 (6th Cir. 1998) (granting deference to *Title II Technical Assistance*). The Department's conclusion that Title II extends to all law enforcement activities follows from the text and history of the statute and definitively establishes that Title II applies to arrests.

B. Title II Requires Law Enforcement Entities To Make Reasonable Modifications When Arresting An Individual With A Disability

1. Because law enforcement entities are subject to Title II, they must "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability." 28 C.F.R. 35.130(b)(7); *Title II Technical Assistance* § II-3.6100, at 14. That requirement extends to the arrest of an individual with a disability. For example, Title II may require a police department to "modif[y] its regular practice of handcuffing arrestees behind their backs, and instead handcuff[] deaf individuals in front in order for the person to sign or write notes." *2006 Guidance* § V. In addition, "an interpreter may be needed in lengthy or complex transactions" involving a deaf arrestee. U.S.

Dep't of Justice, *Communicating with People Who Are Deaf or Hard of Hearing: ADA Guide for Law Enforcement Officers* (Jan. 2006) (*ADA Law Enforcement Guide*); see *Calloway* v. *Boro of Glassboro Dep't of Police*, 89 F. Supp. 2d 543, 555-556 (D.N.J. 2000) (recognizing ADA may require this modification to enable "a hearing impaired individual to participate in the specific police activity in an appropriate manner").

To provide another example, police officers investigating suspected drunk driving must recognize that "typical tests for intoxication, such as walking a straight line, will be ineffective for individuals whose disabilities cause unsteady gaits"; one possible modification is to use "[o]ther tests, like breathalyzers," to obtain "more accurate results and reduce the possibility of false arrest." *2006 Guidance* § II. The ADA also requires law enforcement entities to make reasonable modifications when transporting arrestees with mobility disabilities. *Ibid.* (advising that police departments may be "require[d] * * * to use lift-equipped vans or buses"); see *Gorman* v. *Bartch*, 152 F.3d 907, 913 (8th Cir. 1998) (ADA is "applicab[le] to transportation of arrestees.").

2. Although law enforcement entities enjoy no categorical immunity from the ADA when arresting an individual with a disability, exigencies surrounding police activity will typically play a significant role in determining whether a modification is reasonable. See, *e.g.*, *Seremeth* v. *Board of Cnty. Comm'rs*, 673 F.3d 333, 341 (4th Cir. 2012); *Bircoll* v. *Miami-Dade*

Cnty., 480 F.3d 1072, 1084-1086 (11th Cir. 2007).[3] In particular, police officers do not need to modify their procedures if the modifications would interfere with their ability to address a safety threat, so long as the risk posed by the modification is significant and based on objective evidence. Cf. *Bragdon*, 524 U.S. at 649 (observing that the ADA does "not ask whether a risk exists, but whether it is significant"). For example, when responding to "a violent crime in progress or a similar urgent situation involving a person who is deaf," an "officer's immediate priority is to stabilize the situation," and the officer is permitted to "make an arrest" without the aid of an interpreter. *2006 Guidance* § III; see *ADA Law Enforcement Guide* (advising that if deaf suspect's "behavior is threatening," police officers "can make an arrest and call for an interpreter to be available later at the booking station").

Ensuring the safety of officers and others is an important factor in the context of an ongoing arrest because, while the ADA "demand[s] unprejudiced thought and reasonable responsive reaction" to accommodate individuals with disabilities, it does not

---

[3] A public entity may not, however, rely on exigent circumstances to defend against an ADA claim premised on the failure to properly train law enforcement officers in recognizing and accommodating disabilities. A failure-to-train claim is unaffected by any on-the-ground exigencies surrounding an arrest because "[t]he alleged non-compliance with the training requirements of the ADA" occurs not at the moment of the arrest, but at an earlier time when "policy makers fail[] to institute policies to accommodate disabled individuals * * * by giving the officers the tools and resources to handle the situation peacefully." *Schorr* v. *Borough of Lemoyne*, 243 F. Supp. 2d 232, 238 (M.D. Pa. 2003).

"demand action beyond the realm of the reasonable." *US Airways, Inc.* v. *Barnett*, 535 U.S. 391, 401 (2002); see *Bragdon*, 524 U.S. at 649 (recognizing "the importance of prohibiting discrimination against individuals with disabilities while protecting others from significant health and safety risks"). Thus, under a "practical view of the statute," *Barnett*, 535 U.S. at 402, a modification that raises significant safety concerns will not be reasonable.[4]

C. When Police Officers Arrest A Suspect With A Disability Who Is Armed And Violent, A Modification Ordinarily Will Not Be Reasonable Due To Safety Concerns

This case presents the question whether the ADA requires police officers to modify their conduct when arresting an individual with a disability who is armed and violent. To defeat a motion for summary judgment, a plaintiff raising a failure-to-accommodate claim must "show that an 'accommodation' seems

---

[4] Safety concerns also may obviate the need to provide an accommodation in other circumstances. For example, Title II "does not require a public entity to permit an individual to participate in * * * services, programs, or activities * * * when that individual poses a direct threat to the health or safety of others." 28 C.F.R. 35.139(a). Because the Department's regulations define "direct threat" as "a significant risk to the health or safety of others that cannot be eliminated by a modification," 28 C.F.R. 35.104, a public entity that seeks to avoid ADA liability on this ground must demonstrate that reasonable modifications could not eliminate the threat or reduce it to an acceptable level. See *Title II Technical Assistance* § II-2.8000, at 8. In addition, a public entity "may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities" so long as the "safety requirements are based on actual risks." 28 C.F.R. 35.130(h).

reasonable on its face, *i.e.*, ordinarily or in the run of cases." *Barnett*, 535 U.S. at 401. Because a deviation from ordinary police procedures in this type of arrest situation generally will involve a significant threat to the officers or others on the scene, an accommodation will not be reasonable in the run of cases. However, a plaintiff should "nonetheless remain[] free to show that special circumstances warrant a finding that * * * the requested 'accommodation' is 'reasonable' on the particular facts." *Id.* at 405.[5]

1. Two factors support the conclusion that a modification will ordinarily not be reasonable due to safety concerns when officers arrest an individual with a disability who is armed and violent. First, the risk involved will generally qualify as significant. Arrests are a particularly "dangerous and difficult" law enforcement activity. *Maryland* v. *Garrison*, 480 U.S. 79, 87 (1987). That danger is plainly enhanced when a suspect is armed and has engaged in violent behavior. Cf. *Terry* v. *Ohio*, 392 U.S. 1, 24 (1968) (recognizing need to "neutralize the threat of physical harm" when "an officer is justified in believing that the individual * * * he is investigating at close range is armed and presently dangerous to the officer or to others").

---

[5] *Barnett* analyzed the reasonable-accommodation standard under Title I, which prohibits disability discrimination in employment. Because the regulations implementing Title II contain a similar discrimination prohibition, a plaintiff's burden to show the existence of a reasonable modification should be interpreted the same way. Compare 42 U.S.C. 12112(b)(5)(A) with 28 C.F.R. 35.130(b)(7); see *Dadian* v. *Village of Wilmette*, 269 F.3d 831, 841 (7th Cir. 2001) ("[T]he methods of proving discrimination under Titles I and III should also apply to Title II.").

Law enforcement officers accordingly must calibrate their actions to arrest an armed and violent suspect in the safest manner possible. A modification under these circumstances generally can be expected to impede an officer's ability to ensure her own safety and the safety of others in the vicinity.

Second, the exigencies surrounding the arrest of an armed and violent individual will often create time pressure that may render an accommodation infeasible without increasing safety concerns. When an arrestee possesses a weapon and has threatened officers or others with it, the situation is inherently volatile and will often require swift action to disarm the suspect and secure the area. If police tactics dictate immediate action to resolve the threat, a delay to consider or provide accommodations will likely increase the danger in the ordinary case. See *Waller* v. *City of Danville*, 556 F.3d 171, 175 (4th Cir. 2009) ("Accommodations that might be expected when time is of no matter become unreasonable to expect when time is of the essence."); see also *2006 Guidance* § III (an officer's "immediate priority" when responding to "a violent crime in progress or a similar urgent situation" must be to "stabilize the situation" rather than provide an accommodation).

2. Because a modification in arresting a suspect with a disability who is armed and violent presents significant safety risks in the run of cases, it will ordinarily be unreasonable. In a somewhat analogous context, this Court has recognized that "[t]he statute does not require proof on a case-by-case basis" that the covered entity was justified in denying the accommodation. *Barnett*, 535 U.S. at 403 (holding that ADA ordinarily does not require accommodations that

would trump a seniority system in the employment context). Instead, the ADA plaintiff bears the burden of "show[ing] that special circumstances warrant a finding that * * * the requested 'accommodation' is 'reasonable' on the particular facts." *Id.* at 405.

Applying *Barnett*'s burden-shifting analysis in this context, a public entity's showing that officers were engaged in arresting an armed and violent individual and acted in accordance with their usual procedure should "by itself ordinarily [be] sufficient" to warrant summary judgment on a failure-to-accommodate claim. 535 U.S. at 405. Thus, to avoid dismissal of her claim, a plaintiff who was armed and violent "must explain why, in the particular case," a modification in arresting her "can constitute a 'reasonable accommodation' even though in the ordinary case it cannot." *Id.* at 406.

A plaintiff will satisfy this burden if she can identify a modification that would not have created significant risks that officers had time to implement. For example, a plaintiff who has mental illness may be able to show that officers controlled the timing of executing an arrest warrant and could have altered their procedures with no offsetting safety concern by having a mental-health professional on site. Or a plaintiff could demonstrate that her proposed modification did not mark a significant deviation from ordinary police procedures—or was *more* consistent with the entity's procedures for dealing with individuals with disabilities than the officers' actions—and that the exigency had dissipated by the time of the arrest. A plaintiff also could demonstrate that she no longer had access to a weapon and had ceased acting violently by the time of the arrest. Cf. *Barnett*, 535 U.S. at

405 (listing examples of special circumstances but recognizing they do not "exhaust the kinds of showings that a plaintiff might make" because each case will involve different facts). If a plaintiff points to special circumstances showing that an accommodation was reasonable on the particular facts despite the presence of a weapon and violent behavior during an arrest, a law enforcement entity will not be entitled to summary judgment on that issue.[6]

D. The Case Should Be Remanded For Application Of This ADA Standard

Respondent asserts that petitioners violated the ADA when they forced a second entry into her room rather than accommodating her mental illness by "respect[ing] her comfort zone, engag[ing] in non-threatening communications and us[ing] the passage of time to defuse the situation." Pet. App. 45.[7] Be-

---

[6] Even if a plaintiff carries her threshold burden of identifying a reasonable accommodation, a public entity will not be liable if it "can demonstrate that making the modification[] would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. 35.130(b)(7). In addition, as already noted, Title II "does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others." 28 C.F.R. 35.139(a).

[7] Respondent did not specifically request these modifications during her interaction with the officers. However, when an individual has an impairment that interferes with her ability to request an accommodation, a public entity cannot avoid its ADA obligations by contending that the plaintiff failed to make a specific request. See *Robertson* v. *Las Animas Cnty. Sheriff's Dep't*, 500 F.3d 1185, 1197 (10th Cir. 2007) (observing that entity's knowledge that individual requires a modification will sometimes "follow from the entity's knowledge of the individual's disability"). Thus, if

cause it is undisputed that respondent was armed and had threatened to kill the officers and her social worker, her proposed modification—delaying an entry that police officers judged should be immediate to effectuate her arrest—would not be reasonable in the run of cases. Accordingly, to survive petitioners' motion for summary judgment, respondent should bear "the burden of showing special circumstances" demonstrating that on the particular facts her proposed modification would not have created significant safety risks for the officers or others. *Barnett*, 535 U.S. at 406. Because the court of appeals did not consider the summary judgment record in light of this framework, the Court should follow its usual practice of remanding to the lower courts to apply the appropriate ADA standard. See, *e.g.*, *ibid.*; *Bragdon*, 524 U.S. at 655.

II. PETITIONER OFFICERS ARE ENTITLED TO QUALIFIED IMMUNITY BECAUSE THEY DID NOT VIOLATE A CLEARLY ESTABLISHED FOURTH AMENDMENT RIGHT

Qualified immunity shields individuals from suit unless their actions "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Hope* v. *Pelzer*, 536 U.S. 730, 739 (2002) (citation omitted). The doctrine is designed to ensure that "fear of personal monetary liability and harassing litigation" will not "unduly inhibit officials in the discharge of their duties." *Anderson* v. *Creighton*, 483 U.S. 635, 638 (1987).

---

respondent can carry her burden of showing that a reasonable modification existed, it would not be a valid defense to observe that she failed to expressly request it.

Qualified immunity "turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Messerschmidt* v. *Millender*, 132 S. Ct. 1235, 1245 (2012) (citation omitted). This standard leaves "ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law." *Hunter* v. *Bryant*, 502 U.S. 224, 229 (1991) (per curiam) (citation omitted). Here, petitioner officers are entitled to qualified immunity because respondent cannot demonstrate that they violated any clearly established Fourth Amendment right.[8]

A. 1. a. The first step in analyzing whether a right was "clearly established" is to define the right "at the appropriate level of specificity." *Wilson* v. *Layne*, 526 U.S. 603, 615 (1999); see *Anderson*, 483 U.S. at 639. Framed "as a broad general proposition"—for instance, the right to be free from unreasonable searches and seizures—any constitutional right would be clearly established, and no official would be immune from suit. See *Reichle* v. *Howards*, 132 S. Ct. 2088, 2094 (2012) (citation omitted). Instead, a right must

---

[8] The Fourth Amendment reasonableness inquiry differs from reasonableness under the ADA in an important respect. An officer violates the Fourth Amendment only when her actions are *unreasonable*; thus, the Constitution provides leeway for officers to choose among several reasonable courses of conduct. In contrast, the ADA directs that if a reasonable modification exists, law enforcement entities must provide it (assuming no statutory defenses apply), even if it would also be reasonable not to provide the modification. For this reason, so long as an officer's actions were reasonable in light of clearly established Fourth Amendment standards, it is irrelevant to qualified immunity that those actions might have violated the ADA.

be established "in a 'particularized' sense so that the 'contours' of the right are clear to a reasonable official." *Ibid.* (citation omitted). A court then must ask whether "every reasonable official would [have understood] that what he is doing violates" that particularized right. *Id.* at 2093 (citation omitted; brackets in original). Although "the very action in question [need not have] previously been held unlawful," *Safford Unified Sch. Dist. No. 1* v. *Redding*, 557 U.S. 364, 377 (2009) (citation omitted), a plaintiff must point to "controlling authority" or "a robust consensus of cases of persuasive authority" establishing that the official's conduct was unconstitutional. *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2084 (2011) (citation omitted). In other words, "existing precedent must have placed the * * * constitutional question beyond debate." *Reichle*, 132 S. Ct. at 2093 (citation omitted).

This Court has repeatedly demonstrated how to define a Fourth Amendment right with specificity to determine whether it was clearly established. For example, in *Wilson*, *supra*, the Court framed the relevant inquiry not in terms of "the protections of the Fourth Amendment" generally, but instead in terms of whether "a reasonable officer could have believed that bringing members of the media into a home during the execution of an arrest warrant was lawful, in light of clearly established law and the information the officers possessed." 526 U.S. at 615. In *Brosseau* v. *Haugen*, 543 U.S. 194 (2004) (per curiam), the Court framed the relevant inquiry not in terms of the general Fourth Amendment right against the use of excessive force, but instead in terms of whether it was clearly established that an officer cannot "shoot a disturbed felon, set on avoiding capture through ve-

hicular flight, when persons in the immediate area are at risk from that flight." *Id.* at 200. And in *Saucier* v. *Katz*, 533 U.S. 194 (2001), the Court framed the relevant inquiry not in general excessive-force terms, but rather by asking whether a "reasonable officer in petitioner's position could have believed that hurrying respondent away from the scene, where the Vice President was speaking and respondent had just approached the fence designed to separate the public from the speakers, was within the bounds of appropriate police responses." *Id.* at 201-202, 208.

b. In this case, the right at issue must be framed by reference to the court of appeals' theory of Fourth Amendment liability. As an initial matter, the court recognized that the officers' entries into respondent's room did not require a warrant, Pet. App. 20-25, and that the officers' use of force was reasonable when it occurred, *id.* at 37. Those rulings are clearly correct. The officers' first entry into respondent's room was justified by the emergency aid exception to the warrant requirement, which applies when objective grounds exist to believe that "a person within [the house] is in need of immediate aid." *Michigan* v. *Fisher*, 558 U.S. 45, 47 (2009) (per curiam) (citation omitted; brackets in original). Respondent was off her medication, had stopped eating and taking care of herself, and had just threatened her social worker, who "considered the situation dire enough to apply for a [Section] 5150 detention, * * * call for police assistance," and clear the building of residents. Pet. App. 21. The officers thus had "an objectively reasonable basis for concluding that there was an urgent need to protect [respondent] from serious harm," and

they "acted reasonably by treating the situation as a genuine emergency." *Id.* at 20-21.

The officers were also permitted to reenter respondent's room without a warrant after she forced them to temporarily retreat by threatening them with a knife. When officers encounter an obstacle during a lawful search that requires them to briefly leave the premises, they may subsequently resume the search without independent justification. Pet. App. 24; see *Michigan* v. *Tyler*, 436 U.S. 499, 511 (1978) (classifying second entry as "no more than an actual continuation of the first" under these circumstances). In any event, the emergency aid exception continued to apply because respondent's behavior confirmed her social worker's assessment that she was experiencing a mental health crisis and urgently required help. Pet. App. 23-24. Moreover, after respondent brandished a knife and forced the officers to leave her room, they reasonably could have believed that "immediate entry [wa]s necessary to protect themselves or others from serious harm," thus permitting a warrantless entry under the exigent circumstances exception. *Ryburn* v. *Huff*, 132 S. Ct. 987, 989 (2012) (per curiam).[9]

---

[9] The court of appeals deemed it "questionable" whether this exception would apply because "there was no reason to fear [respondent's] escape" from her second-story window and "[a]rguably, the officers could have avoided harm to themselves by retreating a safe distance from the door." Pet. App. 25 n.8. That reasoning contradicts this Court's recent admonition that "judges should be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation." *Ryburn*, 132 S. Ct. at 991-992. The officers here testified that their second entry was motivated by safety concerns because they were unable to evaluate or contain the threat respondent posed once her door was closed. Pet. App. 12. The officers did

Finally, the officers' use of force was reasonable at "the moment of the shooting," Pet. App. 5a, because respondent "had threatened to kill the officers, she wielded a knife in an upraised position, she advanced toward the officers, she did not drop the knife after being pepper sprayed (or even after being shot) and the shooting took place while [respondent] was only a few feet from a cornered Officer Holder." *Id.* at 37; *Graham* v. *Connor*, 490 U.S. 386, 396 (1989) (excessive-force analysis informed by "whether the suspect poses an immediate threat to the safety of the officers or others").

The court of appeals nevertheless held that respondent's Fourth Amendment claim could proceed because "a jury could find that the officers acted unreasonably by forcing the second entry and provoking a near-fatal confrontation." Pet. App. 5.[10] As the

---

not know whether respondent had access to other weapons or would barricade herself in her room, making their ultimate entry more dangerous. *Ibid.* They also feared that respondent might attempt to escape or harm any others who were present. *Id.* at 71. Because respondent was armed and had threatened the officers and her social worker, a reasonable officer could have believed that there was "an imminent threat of violence." *Ryburn*, 132 S. Ct. at 990.

[10] The court erred in suggesting that jurors should decide whether the officers' actions were objectively reasonable. "At the summary judgment stage, * * * the reasonableness of [an officer's] actions * * * is a pure question of law." *Scott* v. *Harris*, 550 U.S. 372, 381 n.8 (2007) (citation omitted). Likewise, the question whether the officers are entitled to qualified immunity because they "reasonably but mistakenly believed that their entry was necessary," Pet. App. 36, is a legal issue that "ordinarily should be decided by the court long before trial." *Hunter*, 502 U.S. at 228 (criticizing the Ninth Circuit for "routinely plac[ing] the question of immunity in the hands of the jury").

court saw things, "[a] reasonable jury could find that [respondent] was in a confined area and not a threat to others—so long as they did not invade her home." *Id.* at 29. Thus, the court could not conclude that the officers conducted the otherwise lawful search and seizure "in a reasonable manner" because "[t]he officers' decision to force an entry was in effect a decision to cause a violent—and potentially deadly—confrontation with a mentally ill person without a countervailing need." *Id.* at 31. And the court further held that this provocation theory was clearly established because "[i]f there was no pressing need to rush in, and every reason to expect that doing so would result in [respondent's] death or serious injury, then any reasonable officer would have known that this use of force was excessive." *Id.* at 33.

Thus, framing the right at the appropriate level of specificity, the qualified immunity question is whether in 2008 it was clearly established that the Fourth Amendment prohibited officers from making an otherwise lawful entry under the emergency aid and exigent circumstances exceptions to arrest an armed and violent individual known to have mental illness due to the individual's foreseeable resistance.

2. As so framed, the right at issue was not clearly established in 2008.

a. No decision of this Court clearly established that the Fourth Amendment prohibited officers from making an otherwise proper warrantless entry to arrest an individual who has mental illness due to the individual's anticipated resistance. In fact, the Court had recently eschewed a rule that would require officers to cease their lawful pursuit of a fleeing suspect to avoid the use of deadly force. See *Scott* v. *Harris*, 550

U.S. 372, 385-386 (2007). As the Court explained, "[t]he Constitution assuredly does not impose this invitation to impunity-earned-by-recklessness." *Ibid.*

More fundamentally, the court of appeals identified no authority requiring an officer to delay entry under a provocation theory notwithstanding the officer's lawful invocation of the emergency aid and exigent circumstances exceptions. Indeed, there is at least some tension between the court's theory and the justification for those exceptions, which apply when urgent circumstances require immediate action. See, *e.g.*, *Brigham City* v. *Stuart*, 547 U.S. 398, 403 (2006) (officers may rely on emergency aid exception "to render emergency assistance * * * or to protect an occupant from imminent injury"); *Warden* v. *Hayden*, 387 U.S. 294, 299 (1967) (exigency exception applies when officers confront grave danger to "their lives or the lives of others"). In these circumstances, "[s]peed * * * [i]s essential," such that "[t]he Fourth Amendment does not require police officers to delay" to obtain a warrant. *Id.* at 298-299 (holding that dangerous occupant's access to weapons is itself an exigent circumstance justifying immediate warrantless entry, rather than a fact creating a constitutional obligation to delay). The court of appeals cited no law clearly establishing that enough exigency may exist to excuse the warrant requirement, yet officers nevertheless act unreasonably by responding with immediate action.

b. Decisions from the courts of appeals likewise provided no notice that the officers' entry could be unconstitutional. The Seventh Circuit, for example, had observed that "[t]here is no precedent in this Circuit (or any other) which says that the Constitution

requires law enforcement officers to use all feasible alternatives to avoid a situation where deadly force can justifiably be used." *Plakas* v. *Drinski*, 19 F.3d 1143, 1148, cert. denied, 513 U.S. 820 (1994). The Eighth Circuit similarly had rejected the notion that officers could be liable for "creat[ing] the need to use force by their actions prior to the moment of seizure." *Schulz* v. *Long*, 44 F.3d 643, 649 (1995). And several courts had found no constitutional violation or had granted qualified immunity on strikingly similar facts. See, *e.g.*, *Menuel* v. *City of Atlanta*, 25 F.3d 990, 995-997 (11th Cir. 1994) (rejecting Fourth Amendment claim based on lethal force used in arresting mentally ill individual after she attacked officers with a knife and temporarily forced their retreat from her home); *Buchanan* v. *Maine*, 469 F.3d 158, 165-166, 168 (1st Cir. 2006) (deeming it "perfectly clear" that officers were entitled to immunity on claim that they violated the Fourth Amendment by entering home to take mentally ill individual into custody, thereby precipitating the need to use deadly force); see also Pet. Br. 50-54 (collecting additional cases).

Because a reasonable officer canvassing these precedents would not have had clear notice that the Fourth Amendment prohibited her entry, the officers here are entitled to qualified immunity.

3. The court of appeals rested its contrary conclusion on this Court's decision in *Graham* and two Ninth Circuit decisions. Pet. App. 35-36. None of those cases, however, clearly established that the officers here acted unreasonably.

a. The court of appeals cited *Graham* for the general proposition that reasonableness requires balancing an "individual's Fourth Amendment interest[]"

against the "countervailing governmental interests." Pet. App. 33. But that general principle does not establish a particularized right on behalf of individuals with mental illness to be free of a warrantless entry due to their anticipated resistance even when exigent circumstances exist. Because "*Graham* * * * [is] cast at a high level of generality," *Haugen*, 543 U.S. at 199, and does not discuss whether police officers may lawfully enter a home under the exigent circumstances exception when they can anticipate a violent response, *Graham*'s "general constitutional rule" did not bar the officers' conduct with "obvious clarity." *Hope*, 536 U.S. at 741 (citation omitted). See *al-Kidd*, 131 S. Ct. at 2084 (observing that the Court has "repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality") (citation omitted).

b. The court of appeals also erred in denying qualified immunity based on *Alexander* v. *City & County of San Francisco*, 29 F.3d 1355 (9th Cir. 1994), cert. denied, 513 U.S. 1083 (1995). In *Alexander*, police officers who were present to help execute an administrative warrant for a health code inspection forced an entry into a mentally ill individual's home and shot him after he fired a gun at them. *Id.* at 1358, 1360. Noting that the officers' entry was not justified by exigent circumstances, the Ninth Circuit held that summary judgment was inappropriate on a Fourth Amendment claim. *Id.* at 1363-1367 & n.11. The court reasoned that the use of force would be excessive to execute an administrative warrant, but not to arrest the decedent for threatening the officers. *Id.* at 1367. But the court further held that the officers had no right to enter the house to arrest the decedent

"[w]ithout an arrest warrant, and without exigent circumstances." *Id.* at 1361.

In contrast to *Alexander*, the emergency aid and exigent circumstances exceptions applied here. *Alexander* therefore could not place "beyond debate" the question whether officers may enter a home under those exceptions even if an individual's violent response is foreseeable. *Reichle*, 132 S. Ct. at 2093 (citation omitted).

c. The court of appeals' reliance on *Deorle* v. *Rutherford*, 272 F.3d 1272 (9th Cir. 2001), cert. denied, 536 U.S. 958 (2002), is equally misplaced. *Deorle* denied summary judgment on an excessive-force claim when an officer shot an emotionally disturbed individual who was "unarmed, had not attacked or even touched anyone, had generally obeyed the instructions given him by various police officers, and had not committed any serious offense." *Id.* at 1275. Because *Deorle* involved dramatically different facts, it provided no clear notice to the officers here that the Fourth Amendment prohibited their entry.

B. Because it was not clearly established in 2008 that the officers' actions violated the Fourth Amendment, they are entitled to qualified immunity. This case accordingly does not require the Court to decide whether or under what circumstances officers can be liable for provoking a violent response from an individual with mental illness. See *Camreta* v. *Greene*, 131 S. Ct. 2020, 2031 (2011) (suggesting that this approach is most consistent with well-established principles of constitutional avoidance).

Several factors counsel against reaching the constitutional question in this case. See *Pearson* v. *Callahan*, 555 U.S. 223, 236-243 (2009) (describing situa-

tions in which courts properly limit their analysis to the clearly-established prong). First, petitioners did not seek review of the court of appeals' constitutional ruling and this Court's grant of certiorari therefore does not squarely encompass that issue. See Pet. i (question presented limited to "[w]hether it was *clearly established* that even where an exception to the warrant requirement applied an entry into a residence could be unreasonable under the Fourth Amendment by reason of the anticipated resistance of an armed and violent suspect within") (emphasis added). Second, and relatedly, petitioners have not briefed the constitutional question. See *Pearson*, 555 U.S. at 239 (recognizing "risk of bad decisionmaking" if briefs do not address whether a constitutional violation occurred); *Wood* v. *Moss*, 134 S. Ct. 2056, 2070 (2014) ("[l]imiting [the Court's] decision" to whether a right was clearly established when briefing "trained on" that issue). Third, the question whether, drawing all inferences in respondent's favor, the officers violated the Fourth Amendment by entering her room when they did rather than briefly waiting for a non-lethal team to arrive "involves a reasonableness question which is highly idiosyncratic and heavily dependent on the facts"; thus, "the law elaboration purpose will [not] be well served" by addressing the issue. *Buchanan*, 469 F.3d at 168; see *id.* at 167 (granting qualified immunity on claim that "a reasonable officer would have waited outside [the mentally ill decedent's] house," rather than making an immediate entry that would foreseeably necessitate the use of deadly force); see *Pearson*, 555 U.S. at 237 (citing *Buchanan* for proposition that "there are cases in which the consti-

tutional question is so factbound that the decision provides little guidance for future cases").

Finally, there can be no doubt that the right at issue here was not clearly established, but it is a more difficult question whether any such right exists. See *Pearson*, 555 U.S. at 236-237 (discouraging "substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case"). This Court has never addressed whether a police officer's knowledge of a suspect's mental illness may affect the constitutionality of the officer's actions. See Pet. App. 27, 30-31 (observing that individuals with mental illness, in contrast to other suspects, may react irrationally to "an escalating show of force," and that police officers are accordingly trained to alter their tactics in this circumstance); cf. *Scott*, 550 U.S. at 384 & n.10 (indicating that a suspect's culpability factors into the Fourth Amendment reasonableness analysis). In the absence of full briefing, this case is an inappropriate vehicle to consider the issue—particularly given the straightforward conclusion that the officers are entitled to qualified immunity because they violated no clearly established right.

CONCLUSION

The judgment of the court of appeals should be vacated in part and reversed in part.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
JOYCE R. BRANDA
VANITA GUPTA
Acting Assistant Attorneys General
IAN HEATH GERSHENGORN
Deputy Solicitor General
ELIZABETH B. PRELOGAR
Assistant to the Solicitor General
BARBARA L. HERWIG
SHARON M. MCGOWAN
DANA KAERSVANG
HOLLY A. THOMAS
Attorneys

JANUARY 2015

APPENDIX

1. Amendment IV of the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. Amendment XIV of the United States Constitution provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to

any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

3. 42 U.S.C. 1983 provides:

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

4. 42 U.S.C. 12131 provides:

Definitions

As used in this subchapter:

(1) Public entity

The term "public entity" means—

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 24102(4)[1] of title 49).

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

5. 42 U.S.C. 12132 provides:

Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

---

[1] See References in Text note below.

6. 28 C.F.R. 35.130 provides in pertinent part:

General prohibitions against discrimination.

* * * * *

(b)(7) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

* * * * *

7. 28 C.F.R. 35.139 provides:

Direct threat.

(a) This part does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others.

(b) In determining whether an individual poses a direct threat to the health or safety of others, a public entity must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.

AMICUS CURIAE BRIEF

No. 13-1412

FEB 17 2015
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, *et al.*,

Petitioners,

—v.—

TERESA SHEEHAN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN DIABETES ASSOCIATION, THE EPILEPSY FOUNDATION, MENTAL HEALTH AMERICA, THE NATIONAL DISABILITY RIGHTS NETWORK, AND THE ARC, *ET AL.*, IN SUPPORT OF RESPONDENT

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

ALAN L. SCHLOSSER
ACLU FOUNDATION OF NORTHERN CALIFORNIA
39 Drumm Street
San Francisco, CA 94111

CLAUDIA CENTER
Counsel of Record
MATTHEW COLES
SUSAN P. MIZNER
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111
(415) 343-0762
ccenter@aclu.org

Library of Congress
Law Library

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. THE ADA APPLIES TO THE ARREST AND DETENTION OF PEOPLE WITH DISABILITIES AND REQUIRES THAT THEIR DISABILITIES ORDINARILY BE TAKEN INTO ACCOUNT 4

A. The ADA Plainly Applies to Arrests and Detentions. 4

B. The ADA Requires Police Agencies, Like All Others, to Take Disability into Account, with Due Regard for the Nature of Police Work. 7

II. FAILING TO TAKE ACCOUNT OF DISABILITY IN ARREST AND DETENTION OFTEN LEADS TO TRAGIC CONSEQUENCES. 9

A. Persons with Many Types of Disabilities Face Dangerous and Sometimes Lethal Outcomes When Law Enforcement Officers Fail to Take Disability into Account. 9

B. Experience Shows and Many Experts and Police Departments Recognize That Public Safety is Enhanced When Police Modify Their Tactics When Arresting or Detaining Persons with Disabilities. 19

C. Police Officers Detaining or Arresting People with Psychiatric Disabilities Should Be Prepared to Take the Disability into Account. 23

III. THERE ARE TRIABLE FACT QUESTIONS ON WHETHER THE CITY SHOULD HAVE TAKEN MS. SHEEHAN'S DISABILITY INTO ACCOUNT WHEN DETAINING HER. 26

A. San Francisco's Position That it is Entitled to Summary Judgment is Inconsistent with the *Arline* Factors That Govern the Direct Threat Analysis. 26

B. The Writ of Certiorari On the First Question May Have Been Improvidently Granted. 29

CONCLUSION 31

APPENDIX 1a

TABLE OF AUTHORITIES

CASES

Anthony v. City of New York,
339 F.3d 129 (2d Cir. 2003) 6

Bartlett v. N.Y. State Bd. of Law Examiners,
156 F.3d 321 (2d Cir. 1998), *vacated on other grounds*, 527 U.S. 1031 (1999) 8

Bd. of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001) 25

Bermudez v. Ahrens, No. 00 C 50365, 2002 WL 1803741 (N.D. Ill. Aug. 6, 2002) 12

Bircoll v. Miami-Dade Cnty.,
480 F.3d 1072 (11th Cir. 2007) 6

Burkhart v. Washington Metropolitan Area Transit Authority, 112 F.3d 1207 (D.C. Cir. 1997) 6

Champion v. Outlook Nashville, Inc.,
380 F.3d 893 (6th Cir. 2004) 15

Chisolm v. McManimon,
275 F.3d 315 (3d Cir. 2001) 6

Delano-Pyle v. Victoria Cnty., Tex.,
302 F.3d 567 (5th Cir. 2002) 6, 8

Duvall v. Cnty. of Kitsap,
260 F.3d 1124 (9th Cir. 2001) 8

Estate of Saylor v. Regal Cinemas, Inc.,
Civ. Action No. WMN-13-3089, 2014 WL 5320663 (D. Md. Oct. 16, 2014) 16

Fera v. City of Albany,
568 F. Supp. 2d 248 (N.D.N.Y. 2008) 11

Fonseca v. City of Fresno,
No. 1:10-cv-00147 LJO DLB, 2012 WL 44041
(E.D. Cal. Jan. 9, 2012) 16

Gohier v. Enright,
186 F.3d 1216 (10th Cir. 1999) 6

Graham v. Connor,
490 U.S. 386 (1989) 12

Hainze v. Richards,
207 F.3d 795 (5th Cir. 2000) 7, 29

Jackson v. Inhabitants of Town of Sanford,
Civ. No. 94-12-P-H, 1994 WL 589617
(D. Me. Sept. 23, 1994) 13

Lewis v. Truitt,
960 F Supp. 175 (S.D. Ind. 1997) 10

Liese v. Indian River Cnty. Hosp. Dist.,
701 F.3d 334 (11th Cir. 2012) 8

McAllister v. Price,
615 F. 3d 877 (7th Cir. 2010) 13

McCray v. City of Dothan,
169 F. Supp. 2d 1260 (M.D. Ala. 2001), *aff'd in part, rev'd in part, on other grounds*, 67 F.App'x
582 (11th Cir. 2003) 10

Meagley v. City of Little Rock,
639 F.3d 384 (8th Cir. 2011) 8

Meister v. City of Hawthorne,
No. CV-14-1096-MWF (SHx), 2014 WL 3040175
(C.D. Cal. May 13, 2014) 11

N.L.R.B. v. Hendricks Cnty. Rural Elec. Membership Corp., 454 U.S. 170 (1981) 30

Nieves-Marques v. Puerto Rico,
353 F.3d 108 (1st Cir. 2003) 8

Pennsylvania Dep't of Corrections v. Yeskey,
524 U.S. 206 (1998) 4

PGA Tour, Inc. v. Martin,
532 U.S. 661 (2001) 4

Powers v. MJB Acquisition Corp.,
184 F.3d 1147 (10th Cir. 1999) 8

Redding v. Chesnut,
No. 5:06-CV-321 (CDL), 2008 WL 4831741
(M.D. Ga. Nov. 3, 2008) 16

Roberts v. City of Omaha,
723 F.3d 966 (8th Cir. 2013) 6

S.H. ex rel. Durrell v. Lower Merion Sch. Dist.,
729 F.3d 248 (3d Cir. 2013) 8

School Bd. of Nassau Cnty., Fla. v. Arline,
480 U.S. 273 (1987) ..... *passim*

Schreiner v. City of Gresham,
681 F. Supp. 2d 1270 (D. Or. 2010) 13

Seremeth v. Bd. of Cnty. Comm'rs Frederick Cnty.,
673 F.3d 333 (4th Cir. 2012) 6

Sheehan v. City & Cnty. of S.F.,
743 F.3d 1211 (9th Cir. 2014), *cert. granted*, 135 S.
Ct. 702 (2014) 6, 28

Tennessee v. Lane,
541 U.S. 509 (2004) 8

Thompson v. Williamson Cnty., Tenn.,
219 F.3d 555 (6th Cir. 2000) 6

Tucker v. Tennessee,
539 F.3d 526 (6th Cir. 2008) 7

United States v. City of Seattle,
Civil Action No. 12-CV-1282 (W.D. Wash. July 27, 2012) 22

STATUTES

Americans with Disabilities Act of 1991,
42 U.S.C. §§ 12101 *et seq* ..... *passim*

42 U.S.C. § 12112(b)(5)(A) 1

Title II, 42 U.S.C. §§ 12131 *et seq* ..... *passim*

42 U.S.C. § 12131(1) 8

42 U.S.C. § 12132 ..... 4, 6, 7, 8

42 U.S.C. § 12182(b)(2)(A)(ii) 2

The Death in Custody Reporting Act of 2000,
Pub. L. No. 106-297, 114 Stat. 1045 17

REGULATIONS

28 C.F.R. Pt. 35, app. B 5

28 C.F.R. § 35.104, ... 8, 26, 27

28 C.F.R. § 35.130(b)(7) 2, 7

28 C.F.R. § 35.139 ..... 8, 27

28 C.F.R. § 35.139(a) 26

28 C.F.R. § 35.139(b) 27

LEGISLATIVE AND ADMINISTRATIVE DOCUMENTS

136 Cong. Rec. 11,461 (1990)
(statement of Rep. Mel Levine) 6, 10, 12, 13

136 Cong. Rec. 11,471 (1990)
(statement of Rep. Steny Hoyer) 12

House. Comm. Educ. & Labor, H.R. Rep. No. 101-485 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303 5

House Comm. Judiciary, H.R. Rep. No. 101-485 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445 ..... 5, 12

Md. Governor O'Malley, Exec. Order No. 01.01.2013.04, 40 Md. Reg. 1613 (Oct. 4, 2013) ... 21

OTHER AUTHORITIES

Alex Emslie & Rachael Bale, *More Than Half of Those Killed by San Francisco Police are Mentally Ill*, KQED News (Sept. 30, 2014) 17

Andrea M. Burch, Bureau of Justice Statistics, Dep't of Justice, *Arrest-Related Deaths, 2003–2009 - Statistical Tables* (2011) 17, 18

Betsy Vickers, *Memphis, Tennessee, Police Department's Crisis Intervention Team* (U.S. Dep't of Justice, Bureau of Justice Assistance, Practitioner Perspectives Ser. No. NCJ 182501, 2000) 22, 23, 24

Bureau of Justice, *Data Collection: Arrest-Related Deaths,* Bureau of Justice Statistics (Jan. 29, 2015) 17

Burt Herman, *Hearing Impaired Present Special Problems, Opportunities for Police,* Miami Herald, Dec. 14, 1997 11

Cal. Health & Human Servs. Agency, Dep't Health Care Servs., *DHCS 1801, Application for Assessment, Evaluation, and Crisis Intervention or Placement for Evaluation and Treatment* (2014) 24

Comm'n for Effective Cmty. Inclusion of Individuals with Intellectual and Developmental Disabilities, *Annual Report of the Commission* (2014) 21

Comm'n for Effective Cmty. Inclusion of Individuals with Intellectual and Developmental Disabilities, *Initial Report of the Commission* (2014) 21

Deborah L. Bower, et al., *The Albuquerque Police Department's Crisis Intervention Team: A Report Card*, FBI Law Enforcement Bulletin (Feb. 2001) 23

Douglas Quan, Meghan Lewit & Kimberly Trone, *Sheriff: Deadly Fight Provoked*, Press-Enter. (Riverside, Cal.), July 22, 2006 15

Ebony Walmsley, *Epileptic Man Files Suit Against Hamden Police Over Use of Taser*, New Haven Reg., Jan. 26, 2014 11

Elizabeth Hervey Osborn, Comment, *What Happened To "Paul's Law"?: Insights on Advocating for Better Training and Better Outcomes in Encounters Between Law Enforcement and Persons with Autism Spectrum Disorders*, 79 U. Colo. L. Rev. 333 (2008) 14, 21

Evan Sernoffsky, *Deadly-Force Situation with a Better End*, S.F. Chron., Sept. 25, 2014 25

Gina Damron & Tammy Stables Battaglia, *Cops Beat Diabetic, Suit Alleges; Man's Low Blood Sugar was Mistaken for Drunkenness*, Detroit Free Press, Sept. 22, 2008 12

Hetty Chang, *Hawthorne Police Accused of Beating Deaf Man*, NBC L.A. (Feb. 18, 2014, 3:43 pm) 11

Hillsborough County Sheriff's Office, Standard Operating Procedure, Gen. 522.01 (Feb. 8, 2007) 25

Janet R. Oliva, et al., *A Practical Overview of De-Escalation Skills in Law Enforcement: Helping Individuals in Crisis While Reducing Police Liability and Injury*, 10 J. Police Crisis Negotiations 15 (2010) 22

Jennifer Skeem & Lynne Bibeau, *How Does Violence Potential Relate to Crisis Intervention Team Responses to Emergencies?*, Psychiatric Services (Feb. 2008) 24

Julie Scharper, *Eroding a Wall Between Police, the Deaf*, Balt. Sun, Mar. 9, 2009 11

Katharine Ball, *Public Safety Digest; Salinas Police*, Californian (Salinas), June 3, 2014 ..... 22, 25

Kelley Bouchard, *Across Nation, Unsettling Acceptance When Mentally Ill in Crisis are Killed*, Portland Press Herald (Dec. 9, 2012) 17

Leigh Ann Davis, *People with Intellectual Disability in the Criminal Justice System: Victims & Suspects*, The Arc, www.thearc.org/what-we-do/resources/fact-sheets/criminal-justice (last updated Feb. 2015) 15

Linda Goldston, *Former Cops Changing Way Santa Clara County Deals with Mentally Ill in Crisis*, San Jose Mercury News, Nov. 4, 2010 18

Lindsey Wahowiak, *Helping First Responders Spot Lows: Police Get Training to Distinguish Hypoglycemia from Intoxication*, Diabetes Forecast, Jan. 2014 20

Melissa Reuland & Jason Cheney, Police Exec. Research Forum, *Enhancing Success of Police-Based Diversion Programs for People with Mental Illness* (2005) 22

Memorandum from Christopher Pedrini, S.F Police Department Risk Management, on Regarding Officer-Involved Shootings to John Crudo, S.F. Police Department Internal Affairs 9 (Jan. 16, 2014) 18

Michael T. Compton, et al., *Use of Force Preferences and Perceived Effectiveness of Actions Among Crisis Intervention Team (CIT) Police Officers and Non-CIT Officers in an Escalating Psychiatric Crisis Involving a Subject With Schizophrenia*, 37 Schizophrenia Bull. 737 (2009)..... 22, 23

Michelle Bradford, *Few Answers Offered for Springdale Family in Son's Fatal Shooting*, Ark. Democrat-Gazette, Mar. 10, 2006 15

Monique O. Madan, *Coral Gables Police Department Introduces Tool for Autistic Residents*, Miami Herald, Jan. 29, 2015 20

Natalie Neysa Alund, Man *Alleges False Arrest Lenoir City Resident with Cerebral Palsy Sues Sheriff, 4 Others*, Knoxville News-Sentinel, June 6, 2011..... 12

Paul Davis, *Crisis Intervention. Law Enforcement*, Providence Journal, Jan. 18, 2015 24

Police Exec. Research Forum, *Review of Use of Force in the Albuquerque Police Department* (2011)..... 18

Press Release, U.S. Dep't of Justice, *Court Approves Police Reform Agreement in Portland, Oregon* (Aug. 29, 2014)..... 22

Press Release, U.S. Dep't of Justice, *Justice Department Reaches Settlement with the City of Henderson, Nev. to Improve Law Enforcement Communications with People Who Are Deaf or Hard of Hearing* (Aug. 5, 2013) 19

Press Release, U.S. Dep't of Justice, *Justice Department Reaches Settlement with Two Colorado Law Enforcement Agencies to Improve Communication with People Who Are Deaf or Hard of Hearing* (Mar. 21, 2013) 19

Rachel Aviv, *Letter from Albuquerque: Your Son is Deceased*, New Yorker, Feb. 2, 2015 17

S.F Police Dep't, General Order 8.02, Hostage and Barricaded Suspect Incidents (1994) 28

Sarah Burge, *Mother Files Suit over Son's Death*, Press-Enter. (Riverside, Cal.), May 28, 2007 14

Scott Sandlin, *APD, Jail Change Handling of Deaf*, Albuquerque J., Sept. 2, 1995 10

Seminole County Sheriff's Office, General Order No. G-52 (Mar. 20, 2006) 25

Settlement Agreement Between the Elk Grove Village Police Department and the United States of America, Dep't of Justice Complaint No. 204-23-228 (Oct. 28, 2008), *available at* http://www.ada.gov/elk_grove.htm 20

Settlement Agreement Between the United States of America and the City of New Haven, Connecticut, Dep't of Justice Complaint Nos. 204-14-143/204-14-144 (May 20, 2013), *available at* http://www.ada.gov/new-haven/new-haven-sa.htm 20

Settlement Agreement Between the United States of America and the New York City Police Department (Nov. 18, 2009), *available at* http://www.ada.gov /nypd.htm 20

State of New Mexico, Pub. Defender Dep't, *2012 Annual Report* 6 (2012) 18

Tim Sturrock, *Lawsuit: Officer Attacked Retarded Male*, Macon Telegraph (Ga.), Sept. 19, 2006 16

Tux Turkel, *When Police Pull the Trigger in Crisis, the Mentally Ill Often are the Ones Being Shot*, Portland Press Herald (Dec. 8, 2012) 17, 18

U.S. Dep't of Justice, Civil Rights Div., *Commonly Asked Questions About The Americans With Disabilities Act And Law Enforcement* (2006) 5

U.S. Dep't of Justice, Civil Rights Div., *Communicating with People Who Are Deaf or Hard of Hearing: ADA Guide for Law Enforcement Officers* (2006) 5

U.S. Dep't of Justice, Civil Rights Div., *The ADA and City Governments: Common Problems* (2008) 5

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are organizations that represent the interests of millions of Americans with disabilities. *Amici* and the people whose interests they represent are deeply committed to the proper interpretation and vigorous enforcement of the Americans with Disabilities Act (ADA), including the Act's requirement that public agencies provide safe and nondiscriminatory policing for people with disabilities. Full statements of interest from each of the *amici* are set forth in the Appendix to this brief.

SUMMARY OF ARGUMENT

It is critical to the lives of persons with many types of disabilities that police departments adopt and implement policies and practices that take disability into account during police interactions. Approximately half of all fatal police interactions involve persons with psychiatric disabilities.

As the City and County of San Francisco now acknowledge, Title II of the ADA requires nondiscrimination and reasonable modifications (also known as reasonable accommodations)[2] in policing

---

[1] The parties have lodged blanket letters of consent to the filing of *amicus curiae* briefs. No party has authored this brief in whole or in part, and no one other than *amici*, their members or their counsel has made a monetary contribution to the preparation or submission of this brief.

[2] *See* 42 U.S.C. § 12112(b)(5)(A) (2013) (defining disability discrimination in employment to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability" unless the accommodation would impose an undue

activities, including in the type of detention at the heart of this case. In the context of a person with a known psychiatric disability, who is in crisis and subject to involuntary mental health treatment, the ADA requires that police employ widely accepted policing practices that use containment, coordination, communication, and time to seek safe resolutions.

The application of the ADA to the arrest or detention of persons with disabilities does not leave police officers unprotected when they are endangered, or when they make good faith mistakes under difficult circumstances. The ADA provides a defense when officer actions are justified by a direct threat to officer safety or to the safety of the public. And proof of intentional discrimination is required for any award of damages under Title II, a standard that requires at least deliberate indifference.

The crisis intervention practices that take psychiatric disability into account are not "after the fact" recommendations proposed by Ms. Sheehan's expert, as San Francisco argues, *see* Pet. Br. at 14, but are well-known strategies that have been taught

---

hardship); 28 C.F.R. § 35.130(b)(7) (2014) ("A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability," unless such modification would be a fundamental alteration); 42 U.S.C. § 12182(b)(2)(A)(ii) (defining disability discrimination in public accommodation to include "a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities," unless such modification would be a fundamental alteration).

to officers by policing experts for many years prior to the near-fatal shooting that occurred here. They are endorsed and taught by policing experts because they are safer for both officers and persons with disabilities. Nor are these practices inapplicable when a suspect with a disability appears to be dangerous. On the contrary, these practices were specifically designed for potentially dangerous situations. San Francisco's position—that the police should be free to forego these strategies in precisely the situation for which they were meant—makes no sense at all.

Whether a direct threat defense exists is measured by the objective factors accepted by this Court in *School Bd. of Nassau Cnty., Fla. v. Arline*, 480 U.S. 273, 287–89 (1987), and adopted by the Department of Justice in its regulations implementing Title II of the Act. Here, considering the objective evidence, the probability of harm, and the effects of mitigation (that is, whether reasonable accommodation would have lessened any risk of harm), the undisputed facts do not establish San Francisco's direct threat defense as a matter of law.

This Court should affirm the Ninth Circuit's reversal of summary judgment for San Francisco on Teresa Sheehan's ADA claim. Ms. Sheehan is protected by the ADA and is entitled to pursue her claim.

ARGUMENT

I. THE ADA APPLIES TO THE ARREST AND DETENTION OF PEOPLE WITH DISABILITIES AND REQUIRES THAT THEIR DISABILITIES ORDINARILY BE TAKEN INTO ACCOUNT.

A. The ADA Plainly Applies to Arrests and Detentions.

The ADA is a landmark civil rights law.[3] Title II of the ADA prohibits discrimination by any public agency, and it applies broadly to all of "the services, programs, or activities of a public entity." 42 U.S.C. §§ 12131, 12132 (2013).[4] Here, as in *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 209–12 (1998), there is no basis in the statutory language for excluding arrests or detentions by police officers. Guidance documents issued by the U.S. Department of Justice confirm that that the Act applies to arrests

---

[3] *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001) ("In the ADA, Congress provided [a] broad mandate. *See* 42 U.S.C. § 12101(b). In fact, one of the Act's 'most impressive strengths' has been identified as its comprehensive character,. and accordingly the Act has been described as 'a milestone on the path to a more decent, tolerant, progressive society[.]' To effectuate its sweeping purpose, the ADA forbids discrimination against disabled individuals in major areas of public life . ") (citations omitted).

[4] *Pa. Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998) ("As we have said before, the fact that a statute can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'") (citations omitted).

and detentions.[5] Committee reports on the ADA show Congress's intent to cover all activities of public agencies, including police activities such as arrests.[6]

---

[5] 28 C.F.R. pt. 35, app. B (2014) ("The general regulatory obligation to modify policies, practices, or procedures requires law enforcement to make changes in policies that result in discriminatory arrests or abuse of individuals with disabilities."); *id.* ("[T]itle II applies to anything a public entity does."); U.S. Dep't of Justice, Civil Rights Div., *The ADA and City Governments: Common Problems* (2008) ("When dealing with persons with disabilities, law enforcement agencies often fail to modify policies, practices, or procedures in a variety of law enforcement settings—including citizen interaction, detention, and arrest procedures. When interacting with police and other law enforcement officers, people with disabilities are often placed in unsafe situations or are unable to communicate with officers because standard police practices and policies are not appropriately modified."); U.S. Dep't of Justice, Civil Rights Div., *Commonly Asked Questions About The Americans With Disabilities Act And Law Enforcement* (2006) ("The ADA affects virtually everything that officers and deputies do, for example: arresting suspects[.]"); U.S. Dep't of Justice, Civil Rights Div., *Communicating with People Who Are Deaf or Hard of Hearing: ADA Guide for Law Enforcement Officers* (2006).

[6] House Comm. Judiciary, H.R. Rep. No. 101-485, pt. 3, at 50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 473 ("In order to comply with the non-discrimination mandate, it is often necessary to provide training to public employees about disability. For example, persons who have epilepsy, and a variety of other disabilities, are frequently inappropriately arrested and jailed because police officers have not received proper training in the recognition of and aid for seizures."); House. Comm. Educ. & Labor, H.R. Rep. No. 101-485, pt. 2, at 39, 85 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 321, 367 ("[I]n one case in San Diego, California, a deaf woman died of a heart attack because the police did not respond when her husband tried to use his TDD to call 911[.]"); *accord* 136 Cong.

While the Fifth Circuit found an unwritten exception in the Act excluding arrests, the Second, Fourth, Eighth, Ninth, Tenth, and Eleventh Circuits, and possibly the Fifth Circuit in a different panel, have all applied the ADA to arrests and related police interactions.[7] Indeed, even the City of San Francisco now

---

Rec. 11,461 (1990) (statement of Rep. Mel Levine) ("Regretfully, it is not rare for persons with disabilities to be mistreated by the police. Sometimes this is due to persistent myths and stereotypes about disabled people. At other times, it is actually due to mistaken conclusions drawn by the police officer witnessing a disabled person's behavior. . . . Although I have no doubt that police officers in these circumstances are acting in good faith, these mistakes are avoidable and should be considered illegal under the Americans with Disabilities Act.

One way to cut down on these incidents is for police officers to receive training about various disabilities.").

[7] *Sheehan v. City & Cnty. of S.F.*, 743 F.3d 1211, 1231–33 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 702 (2014); *Roberts v. City of Omaha*, 723 F.3d 966, 973 (8th Cir. 2013) ("[T]he ADA and the Rehabilitation Act apply to law enforcement officers taking disabled suspects into custody."); *Seremeth v. Bd. of Cnty. Comm'rs Frederick Cnty.*, 673 F.3d 333, 338 (4th Cir. 2012) ("[I]n light of *Yeskey*'s expansive interpretation, the ADA applies to police interrogations "); *Bircoll v. Miami-Dade Cnty.*, 480 F.3d 1072, 1084–85 (11th Cir. 2007) (noting that the final clause of Section 12132 "is a catch-all phrase that prohibits all discrimination by a public entity, regardless of the context.") (citation omitted); *Anthony v. City of New York*, 339 F.3d 129, 140–41 (2d Cir. 2003); *Delano-Pyle v. Victoria Cnty., Tex.*, 302 F.3d 567, 574–76 (5th Cir. 2002) (applying ADA to sobriety test of deaf driver suspected of intoxication); *Thompson v. Williamson Cnty., Tenn.*, 219 F.3d 555, 558 (6th Cir. 2000) (applying ADA to police response to 911 call); *Gohier v. Enright*, 186 F.3d 1216, 1221 (10th Cir. 1999) ("[A] broad rule categorically excluding arrests from the scope of Title II ... is not the law."); *Burkhart v. Washington Metropolitan Area Transit Authority*, 112 F.3d 1207, 1214–15 (D.C. Cir. 1997); *Chisolm v. McManimon*, 275 F.3d 315, 324–29 (3d Cir. 2001)

concedes that its actions in this case are covered by the ADA.[8] The ADA applies to arrests and detentions.

B. The ADA Requires Police Agencies, Like All Others, to Take Disability into Account, with Due Regard for the Nature of Police Work.

Under the ADA, public agencies must ensure even-handed treatment and equal opportunity. To provide such equality, the ADA requires government agencies to take disability into account by making reasonable modifications of their policies and practices where needed. 42 U.S.C. § 12132, 28 C.F.R. § 35.130(b)(7) (2014). As Justice Ginsburg wrote in her concurring opinion in *Tennessee v. Lane*: "Including individuals with disabilities among people who count in composing 'We the People,' Congress understood would sometimes require not blind-folded equality, but responsiveness to difference; not indifference, but accommodation." *Lane*, 541 U.S.

(applying ADA to jail intake procedure). *But see Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000) ("[W]e hold that Title II does not apply to an officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life."); and *see also Tucker v. Tennessee*, 539 F.3d 526, 531–36 (6th Cir. 2008) (questioning application of ADA to arrest but ruling that "even if the arrest were within the ambit of the ADA, the district court correctly found that the City Police did not intentionally discriminate against [plaintiffs] because of the their disabilities in violation of the ADA.")

[8] The absence of any dispute among the parties about whether the ADA applies suggests that Certiorari was improvidently granted on the first question. *See* Point III.B, *infra*.

509, 536 (2004). The regulations and guidance of the U.S. Department of Justice confirm that the requirement that practices be modified to take disability into account applies to arrest and detention.[9]

That requirement, however, does not prevent police agencies from safely and effectively doing their work. Modifications to take account of disability are not required where there is a direct threat to the safety of officers or to members of the public. *See Arline*, 480 U.S. at 288; 28 C.F.R. §§ 35.104, 35.139. Moreover, in challenges to the good faith acts of government agencies, including police departments, courts require a showing of intentional discrimination to support an award of damages.[10] This means that at the least, a plaintiff must show deliberate indifference.[11] And individual police officers face no liability under the ADA.[12]

---

[9] *See supra* note 5.

[10] *Delano-Pyle v. Victoria Cnty., Texas*, 302 F.3d 567, 575 (5th Cir. 2002). *See also Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1138-39 (9th Cir. 2001); *S.H. ex rel. Durrell v. Lower Merion Sch. Dist.*, 729 F.3d 248, 263 (3d Cir. 2013); *Liese v. Indian River Cnty. Hosp. Dist.*, 701 F.3d 334, 344–45 (11th Cir. 2012); *Meagley v. City of Little Rock*, 639 F.3d 384, 389 (8th Cir. 2011); *Nieves-Marques v. Puerto Rico*, 353 F.3d 108, 126 (1st Cir. 2003); *Powers v. MJB Acquisition Corp.*, 184 F.3d 1147, 1152–53 (10th Cir. 1999); *Bartlett v. N.Y. State Bd. of Law Examiners*, 156 F.3d 321, 331 (2d Cir. 1998), *vacated on other grounds*, 527 U.S. 1031 (1999).

[11] *Durrell*, 729 F.3d at 263; *Liese*, 701 F.3d at 344–45; *Meagley*, 639 F.3d at 389; *Duvall*, 260 F.3d at 1138–39; *Powers*, 184 F.3d at 1153; *Bartlett*, 156 F.3d at 331.

[12] 42 U.S.C. §§ 12131(1), 12132.

As Point II below demonstrates, the kinds of modifications the ADA requires for arrests and detentions are in fact what sound police practice dictates for the safety of officers, people with disabilities and the public. By requiring that disability be taken into account in arrest and detention, but at the same time allowing an exception for direct threats as well as limiting damages liability, the ADA sensitively accounts for the needs of both police agencies and people with disabilities.

II. FAILING TO TAKE ACCOUNT OF DISABILITY IN ARREST AND DETENTION OFTEN LEADS TO TRAGIC CONSEQUENCES.

A. Persons with Many Types of Disabilities Face Dangerous and Sometimes Lethal Outcomes When Law Enforcement Officers Fail to Take Disability into Account.

Hundreds of Americans with disabilities die every year in police encounters, and many more are seriously injured. Many of these deaths and injuries are needless, the tragic result of police failing to use well-established and effective law enforcement practices that take disability into account. Such practices are widely understood and widely used in police encounters to protect officers, the public, and people with disabilities. What follows is a brief summary of the harms that occur when police do not use practices that take disability into account including, as in this case, psychiatric disability.

i. People who are deaf or hard of hearing.

Even when police officers know a person is deaf or hard of hearing, the officers often misperceive their actions and treat them as uncooperative. *See, e.g.*, *McCray v. City of Dothan*, 169 F. Supp. 2d 1260, 1269–70, 1275–76 (M.D. Ala. 2001) (officers knew plaintiff was deaf and could not read lips, but perceived him as uncooperative; finding triable evidence on ADA claim where officers slammed plaintiff's head on a restaurant table hard enough to break it, used a painful chokehold on him, forcibly removed him from the restaurant, and arrested him), *aff'd in part, rev'd in part, on other grounds*, 67 F.App'x 582 (11th Cir. 2003), *available at* 2003 WL 23518420.[13] Police officers often make it difficult for deaf or hard of hearing people to communicate, for example by handcuffing their hands behind their backs.[14] Officers may mistake deaf individuals' use of

---

[13] *See also Lewis v. Truitt*, 960 F. Supp. 175, 178–79 (S.D. Ind. 1997) (denying summary judgment for police department on ADA claim where officers visiting residence to transfer custody of minor child refused to believe that grandfather was deaf, and forcibly arrested him, causing contusions and severe internal injuries).

[14] Scott Sandlin, *APD, Jail Change Handling of Deaf*, Albuquerque J., Sept. 2, 1995, at A1 ("Officers, who thought he was a patron being ejected from a nearby restaurant for disturbing the peace, forced him to the ground and handcuffed him. That rendered him unable to communicate using American Sign Language, his primary means of communication, even though he tried to let the officers know he couldn't hear and etched the initials ADA into the dirt near his bus bench."); *see also* 136 Cong. Rec. 11,461 (1990) (statement of Rep. Mel Levine) ("Many times, deaf persons who are arrested are put in handcuffs. But many deaf persons use their hands to

sign language for aggressive behavior.[15] When a deaf individual reaches for a pen and paper to pass notes with a police officer, or a printed card stating that he or she is deaf, officers sometimes assume that the person is reaching for a weapon and respond with lethal force.[16]

ii. Persons with disabilities such as epilepsy, diabetes, stroke, or cerebral palsy.

Persons with disabilities such as epilepsy,[17]

---

communicate, either through sign language or by writing a note to a nondisabled person who does not know sign language. The deaf person thus treated is completely unable to communicate.").

[15] Hetty Chang, *Hawthorne Police Accused of Beating Deaf Man*, NBC L.A. (Feb. 18, 2014, 3:43 pm), http://www.nbclosangeles.com/news/local/lawsuit-hawthorne-police-allegedly-beat-deaf-man-245916161.html (describing allegation that Hawthorne police assaulted and tasered deaf man, who was trying to free his hands from the officer's grip to gesture that he could not hear); *Meister v. City of Hawthorne*, No. CV-14-1096-MWF (SHx), 2014 WL 3040175, at **1, 6 (C.D. Cal. May 13, 2014) (denying Hawthorne's motion to dismiss); Julie Scharper, *Eroding a Wall Between Police, the Deaf*, Balt. Sun, Mar. 9, 2009, at 1A (noting that, in emergency or emotional situations, deaf people "sign with larger and more dramatic gestures . . .").

[16] Burt Herman, *Hearing Impaired Present Special Problems, Opportunities for Police*, Miami Herald, Dec. 14, 1997, at 5B (describing how a deaf individual who "was reaching for a card that would have explained he was deaf" was fatally shot by police because police mistook his action as a threat of force).

[17] Ebony Walmsley, *Epileptic Man Files Suit Against Hamden Police Over Use of Taser*, New Haven Reg., Jan. 26, 2014, at A1 (describing how a man was tasered by two officers while experiencing a seizure in his car, despite a passenger explaining that the man had epilepsy); *Fera v. City of Albany*, 568 F. Supp. 2d 248, 259 (N.D.N.Y. 2008) (finding a triable issue on

diabetes,[18] cerebral palsy,[19] and disabilities resulting

---

plaintiff's Title II ADA claim as to whether police officers had knowledge of plaintiff's epilepsy and that she was about to have a seizure when they placed her alone in the back of a van after arresting her); *accord* H.R. Rep. No. 101-485, pt. 3, *supra* note 6, at 50; *see also* 136 Cong. Rec. 11,461 (1990) (statement of Rep. Mel Levine) ("Persons with epilepsy who are having seizures are often inappropriately dealt with by the police."); *accord* 136 Cong. Rec. 11,471 (1990) (statement of Rep. Steny Hoyer) ("[P]ersons who have epilepsy are sometimes inappropriately arrested because police officers have not received proper training to recognize seizures and to respond to them. In many situations, appropriate training of officials will avert discriminatory actions.").

[18] *Graham v. Connor*, 490 U.S. 386, 388–89, 397 (1989) (vacating directed verdict for law enforcement officers in section 1983 claim brought by diabetic individual who sustained a broken foot, cuts on his wrists, a bruised forehead, and an injured shoulder when arrested by police who misperceived his behavior during an insulin reaction); Gina Damron & Tammy Stables Battaglia, *Cops Beat Diabetic, Suit Alleges; Man's Low Blood Sugar was Mistaken for Drunkenness*, Detroit Free Press, Sept. 22, 2008 (describing how a man with diabetes who experienced a hypoglycemic episode while driving was allegedly thrown headfirst into the ground, resulting in brain injury leaving him comatose, despite the officers seeing his insulin pump and diabetes equipment in the vehicle).

[19] Natalie Neysa Alund, Man *Alleges False Arrest Lenoir City Resident with Cerebral Palsy Sues Sheriff, 4 Others*, Knoxville News-Sentinel, June 6, 2011, at A1 (describing how a man with cerebral palsy accidentally hit a dog while driving, and subsequently tried to report the incident but was arrested for drunk driving despite efforts to reassure the officers that he was disabled); *Bermudez v. Ahrens*, No. 00 C 50365, 2002 WL 1803741, at *1 (N.D. Ill. Aug. 6, 2002) (denying defendants' motion for summary judgment on Section 1983 excessive force claim where officer repeatedly tried to pull the left arm of a woman with cerebral palsy behind her back, despite encountering resistance and being told by the woman that it

from a stroke are sometimes mistakenly thought by police to be intoxicated or using drugs. It is all too common that individuals with these disabilities are subjected to significant and unnecessary force by officers even where the condition is known or knowable and the situation can be safely resolved through a simple accommodation. *See, e.g., Schreiner v. City of Gresham*, 681 F. Supp. 2d 1270, 1279 (D. Or. 2010) (denying summary judgment where police tasered a woman with known diabetes multiple times in situation where medical personnel was on the scene and where plaintiff, as a result of a dangerously low blood sugar, was incoherent and unable to respond to orders); *McAllister v. Price*, 615 F. 3d 877, 886 (7th Cir. 2010) (denying summary judgment where plaintiff with diabetes and wearing a medical alert necklace, in a severe hypoglycemic state and unresponsive to officer's order, was thrown and kneed to the ground, and handcuffed, resulting in broken hip and bruised lung); *Jackson v. Inhabitants of Town of Sanford*, Civ. No. 94-12-P-H, 1994 WL 589617, at *6 (D. Me. Sept. 23, 1994) (denying defendant's motion for summary judgment where plaintiff, who had a physical disability resulting from a stroke, was pulled over and arrested by police officers because they perceived his disability-related conduct to be the result of drug or alcohol abuse, and noting that: "Title II of the ADA clearly applies to acts of discrimination by a public

---

was her bad arm and could not go behind her back (due to her cerebral palsy)); *see also* 136 Cong. Rec. 11,461 (1990) (statement of Rep. Mel Levine) ("[I]t is not unusual for a person with cerebral palsy, who might walk in a staggering manner, to be mistaken for someone who is drunk.").

entity against a disabled individual.").

iii. Autistic persons.

Persons with autism spectrum disorder (ASD) also face physical injury and death when their behavior is misinterpreted during encounters with law enforcement. An autistic person may take longer to process and understand information, and may be unable to follow instructions promptly.[20] An autistic person may take instructions very literally, or be unable to maintain eye contact. Some autistic persons may repeat words or imitate officers.[21] These behaviors can be misunderstood as being rude, evasive, or suspicious. Some autistic persons, unable to tolerate the sensory overload of a police interaction, such as lights, sirens, uniforms, and loud voices, may scream or try to flee the situation.[22] Often the police response aggravates the individual's distress, further impairing the ability to

---

[20] In 2003, a 15-year-old autistic boy named Paul Childs was shot and killed at his home by Denver police within 32 seconds of their arrival when he did not drop a knife as ordered. Elizabeth Hervey Osborn, Comment, *What Happened To "Paul's Law"?: Insights on Advocating for Better Training and Better Outcomes in Encounters Between Law Enforcement and Persons with Autism Spectrum Disorders*, 79 U. Colo. L. Rev. 333, 335–37 (2008).

[21] Sarah Burge, *Mother Files Suit over Son's Death*, Press-Enter. (Riverside, Cal.), May 28, 2007, at B1 ("[A person with ASD] may simply imitate the [police] officers, which can spell trouble if officers are loud and aggressive.").

[22] Osborn, *supra* note 15, at 343 ("[T]he presence of police—lights and sirens, uniforms, loud and unfamiliar voices, barking dogs—often makes a difficult situation worse by contributing to the individual's sensory overload.").

communicate or comply.[23] The result can be death.[24]

iv. Persons with intellectual disability.

Individuals with intellectual disability may "not understand commands [or] instructions ... be overwhelmed by police pressure[,] ... [or] act upset at being detained and/or try to run away[.]"[25] In a

---

[23] *Id.* at 343–44 ("Traditional law enforcement techniques for controlling and containing such a situation are ineffective and may provoke further escalation or a violent physical outburst by the person with ASD. Such outbursts do not result from 'meanness or acts of purposeful injury to others,' but rather they are a reaction to the overwhelming environmental stimuli. Paradoxically, the more force a police officer applies to gain control over the situation, the more dangerous and out of control the situation likely becomes.").

[24] *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 900–09 (6th Cir. 2004) (upholding jury verdict against officers whose forceful restraint caused death of Calvin Champion, a nonverbal, nonresponsive autistic person); Douglas Quan, Meghan Lewit & Kimberly Trone, *Sheriff: Deadly Fight Provoked*, Press-Enter. (Riverside, Cal.), July 22, 2006, at B1 (describing July 2006 arrest-related death of 21-year-old autistic man Raymond Mitchell who hid in his mother's bedroom closet).

[25] Leigh Ann Davis, *People with Intellectual Disability in the Criminal Justice System: Victims & Suspects*, The Arc, www.thearc.org/what-we-do/resources/fact-sheets/criminal-justice (last updated Feb. 2015); *see also* Michelle Bradford, *Few Answers Offered for Springdale Family in Son's Fatal Shooting*, Ark. Democrat-Gazette, Mar. 10, 2006 (describing fatal shooting of 21-year-old man with an intellectual disability and cerebral palsy after, according to police, he failed to follow instructions); *Fonseca v. City of Fresno*, No. 1:10-cv-00147 LJO DLB, 2012 WL 44041, at **1, 8, 12 (E.D. Cal. Jan. 9, 2012) (describing violent encounter with police that occurred after man with an intellectual disability did not follow verbal commands, and denying summary judgment on constitutional claims); Tim

recent case, Ethan Saylor, a 26-year-old man with Down Syndrome, died during an altercation with off-duty Maryland police officers who were working as security guards at a movie theater in January 2013. Although Mr. Saylor's full-time aide explained his disability to the officers, stated that his mother was coming to help, and requested that the officers wait for Mr. Saylor to calm down, the officers refused, and forcibly dragged him from his seat, causing fatal injuries. *Estate of Saylor v. Regal Cinemas, Inc.*, Civ. Action No. WMN-13-3089, 2014 WL 5320663, at **1–2 (D. Md. Oct. 16, 2014).[26]

Sturrock, *Lawsuit: Officer Attacked Retarded Male*, Macon Telegraph (Ga.), Sept. 19, 2006 (describing lawsuit arising from 2004 incident in which officer assaulted individual with intellectual disability who did not comply with officer's verbal commands); *Redding v. Chesnut*, No. 5:06-CV-321 (CDL), 2008 WL 4831741, at *8 (M.D. Ga. Nov. 3, 2008) (dismissing ADA claim where officer "did not know or have reason to know that Plaintiff was developmentally disabled when [he] knocked Plaintiff to the ground and attempted to restrain him.").

[26] As detailed in a federal lawsuit filed by his estate, Mr. Saylor had paid for and watched a movie, accompanied by his full-time aide, as he had done hundreds of times before. This time, he wanted to see the movie a second time without purchasing a second ticket, and sat quietly in his seat, refusing to leave. Although his aide explained that Mr. Saylor had Down Syndrome, that he would react negatively if touched, that he needed time to calm down, and that his mother was on her way, the officers refused to wait. They entered the theater and dragged Mr. Saylor to the back, handcuffed him, and forced him to the ground, causing the injuries that killed him. *Estate of Saylor*, 2014 WL 5320663 at **1–2.

v. Persons with psychiatric disabilities.

Persons with significant psychiatric disabilities face the greatest risk of injury or death during their encounters with law enforcement. During mental health crises, individuals with psychiatric disabilities are often shot or beaten when they cannot follow the orders of police officers.[27] While complete data are not available,[28] it is estimated that about half of fatal police encounters involve persons with psychiatric disabilities.[29] This

---

[27] Rachel Aviv, *Letter from Albuquerque: Your Son is Deceased*, New Yorker, Feb. 2, 2015; Alex Emslie & Rachael Bale, *More Than Half of Those Killed by San Francisco Police are Mentally Ill*, KQED News (Sept. 30, 2014), http://ww2.kqed.org/news/2014/09/30/half-of-those-killed-by-san-francisco-police-are-mentally-ill; Kelley Bouchard, *Across Nation, Unsettling Acceptance When Mentally Ill in Crisis are Killed*, Portland Press Herald (Dec. 9, 2012); Tux Turkel, *When Police Pull the Trigger in Crisis, the Mentally Ill Often are the Ones Being Shot*, Portland Press Herald (Dec. 8, 2012).

[28] The Death in Custody Reporting Act of 2000, Pub. L. No. 106-297, 114 Stat. 1045, expired in 2006, although the Bureau of Justice Statistics (BJS) continues to collect data on a voluntary basis. *Data Collection: Arrest-Related Deaths*, Bureau of Justice Statistics, https://www.bjsard.org/AboutARD.aspx (last visited Jan. 29, 2015). The BJS describes arrest-related deaths as "under-reported," and notes that states may use any methodology for measuring arrest-related deaths. Andrea M. Burch, Bureau of Justice Statistics, Dep't of Justice, *Arrest-Related Deaths, 2003–2009 - Statistical Tables* (2011). The BJS does not report any disability-related data.

[29] Emslie & Bale, *supra* note 27 ("A KQED review of 51 San Francisco officer-involved shootings between 2005 and 2013 found that 58 percent—or 11 people—of the 19 individuals killed by police had a mental illness that was a contributing factor in the incident."); Bouchard, *supra* note 27 ("A review of

translates to hundreds of deaths annually.[30]

---

available reports indicates that at least half of the estimated 375 to 500 people shot and killed by police each year in this country have mental health problems."); *id.* (noting that, in New Hampshire, seven of nine people (78 percent) shot and killed by police between 2007 and 2012 had mental health issues, according to state attorney general reports; in Syracuse, N.Y., three of five people (60 percent) shot by police in 2011 were mentally ill, according to news reports; in Santa Clara County, officials reported that nine of 22 people (41 percent) shot during a recent five-year period were mentally ill); Turkel, *supra* note 22 (finding that 42 percent of 57 police shootings in Maine since 2000 involved persons with mental health problems, and that 19 of 33 fatalities (58 percent) were persons with mental health problems); Linda Goldston, *Former Cops Changing Way Santa Clara County Deals with Mentally Ill in Crisis*, San Jose Mercury News, Nov. 4, 2010 (of 22 officer-involved shootings from 2004 to 2009, 10 involved persons with mental illness); Police Exec. Research Forum, *Review of Use of Force in the Albuquerque Police Department* 13 (2011) (finding that 54 percent of people "whose actions led APD officers to use deadly force" had a confirmed history of mental illness); State of New Mexico, Pub. Defender Dep't, *2012 Annual Report* 6 (2012) (reporting that that 75 percent of police shootings in the last two years had a "mental health context"); Memorandum from Christopher Pedrini, S.F. Police Department Risk Management, on Regarding Officer-Involved Shootings to John Crudo, S.F. Police Department Internal Affairs 9 (Jan. 16, 2014) [hereinafter *S.F.P.D. Memo*], *available at* https://www.scribd.com/doc/242229894/San-Francisco-Police-Department-Officer-Involved-Shootings-Summary-2000-2014.

[30] Between 2003 and 2009, law enforcement agencies reported 4,813 arrest-related deaths, with most—2,931—attributed to homicide by law enforcement personnel. Burch, *supra* note 28. In 2008, the year Ms. Sheehan was shot, there were 404 arrest-related deaths attributed to homicide by law enforcement. *Id.*

B. Experience Shows and Many Experts and Police Departments Recognize That Public Safety is Enhanced When Police Modify Their Tactics When Arresting or Detaining Persons with Disabilities.

Many tragic deaths and injuries of people with disabilities are avoidable. As experts and law enforcement have recognized, there are safe and effective ways for police officers to do their jobs *and* take disability into account. Across the country, law enforcement agencies are adopting practices that improve safety when police encounter persons with disabilities. Often these practices are implemented to help police departments comply with the ADA. For example, for deaf and hard of hearing individuals, police departments are contracting with agencies to provide on-call interpreters, handcuffing individuals in front when safe, and using pictograms in the field.[31] Similarly, communication cards are being

---

[31] *See* Press Release, U.S. Dep't of Justice, *Justice Department Reaches Settlement with the City of Henderson, Nev. to Improve Law Enforcement Communications with People Who Are Deaf or Hard of Hearing* (Aug. 5, 2013), *available at* http://www.justice.gov/opa/pr/justice-department-reaches-settlement-city-henderson-nev-improve-law-enforcement; Press Release, U.S. Dep't of Justice, *Justice Department Reaches Settlement with Two Colorado Law Enforcement Agencies to Improve Communication with People Who Are Deaf or Hard of Hearing* (Mar. 21, 2013), *available at* http://www.justice.gov/opa/pr/justice-department-reaches-settlement-two-colorado-law-enforcement-agencies-improve; Settlement Agreement Between the United States of America and the City of New Haven, Connecticut, Dep't of Justice Complaint Nos. 204-14-143/204-14-144 (May 20, 2013), *available at* http://www.ada.gov/new-

used to facilitate communication between officers and persons with autism spectrum disorder or intellectual disability. [32] Training helps prepare officers to deal with individuals with diabetes.[33]

To ensure safe and nondiscriminatory interactions with persons with mental disabilities such as autism, intellectual disability, or mental illnesses, police departments are using crisis intervention and de-escalation strategies. These strategies rely on the use of time, containment, communication with the individual, and coordination with trained staff, to reach non-lethal and safe resolutions. For example, in response to the death of Ethan Saylor, the Governor of Maryland created a special commission to develop better practices for interactions between first responders and individuals with intellectual and developmental disabilities; the commission has urged the adoption of crisis

---

haven/new-haven-sa.htm; Settlement Agreement Between the Elk Grove Village Police Department and the United States of America, Dep't of Justice Complaint No. 204-23-228 (Oct. 28, 2008), *available at* http://www.ada.gov/elk_grove.htm; Settlement Agreement Between the United States of America and the New York City Police Department (Nov. 18, 2009), *available at* http://www.ada.gov /nypd.htm .

[32] Monique O. Madan, *Coral Gables Police Department Introduces Tool for Autistic Residents*, Miami Herald, Jan. 29, 2015.

[33] *See, e.g.*, Lindsey Wahowiak, *Helping First Responders Spot Lows: Police Get Training to Distinguish Hypoglycemia from Intoxication*, Diabetes Forecast, Jan. 2014 (describing law enforcement trainings in Pennsylvania, Indiana, Mississippi, and New Mexico on recognizing and responding to diabetes-related emergencies).

intervention de-escalation strategies.[34]

Crisis intervention and de-escalation practices have been adopted across the country.[35] These

---

[34] *See, e.g.*, Md. Governor O'Malley, Exec. Order No. 01.01.2013.04, 40 Md. Reg. 1613 (Oct. 4, 2013) (in response to death of Ethan Saylor, establishing commission to develop recommendations about the types of policies, guidelines, or practices that Maryland should adopt regarding law enforcement officials, paramedics, and other first responders' behavior in situations involving individuals with intellectual and developmental disabilities); Comm'n for Effective Cmty. Inclusion of Individuals with Intellectual and Developmental Disabilities, *Initial Report of the Commission* (2014) (noting that required training for first responders should include communication techniques, recognition indicators for assessing whether an individual may have an intellectual or developmental disability, intervention strategies such as disengagement and de-escalation, and alternatives to the use of lethal force and prone restraints); Comm'n for Effective Cmty. Inclusion of Individuals with Intellectual and Developmental Disabilities, *Annual Report of the Commission* app. B (2014) (detailing state-wide police training objectives, including "the procedures an officer should follow to ensure the safety and calmness of an individual that has an intellectual/developmental disability," the "communication techniques required to effectively interact with a person who has an intellectual/developmental disability," "conflict resolution and de-escalation techniques that will lead to effective communications with a person who has an I/DD," "interaction techniques to employ with a person with an I/DD, and "the procedures an officer uses to ensure compliance with the Americans with Disabilities Act when encountering a person with an Intellectual, Developmental, or Physical disability.").

[35] Osborn, *supra* note 20, at 344; *see also id.* at 368–70 (describing changes made to Denver's use of force policy and training following death of Childs); Press Release, U.S. Dep't of Justice, *Court Approves Police Reform Agreement in Portland,*

policing tactics are widely accepted,[36] and have been shown to be safer for both police officers and persons with disabilities.[37] *See, e.g.*, Katharine Ball, *Public*

Oregon (Aug. 29, 2014), *available at* http://www.justice.gov/opa/pr/court-approves-police-reform-agreement-portland-oregon; Settlement Agreement and Stipulated [Proposed] Order of Resolution at ¶¶ 130–37, *United States v. City of Seattle*, Civil Action No. 12-CV-1282 (W.D. Wash. July 27, 2012) ("SPD will continue to provide Crisis Intervention training as needed to ensure that CI trained officers are available on all shifts to respond to incidents or calls involving individuals known or suspected to have a mental illness, substance abuse, or a behavioral crisis ('individuals in crisis'). . .

SPD's CI training will continue to address field evaluation, suicide intervention, community mental health resources, crisis de-escalation, and scenario exercises," *available at* http://www.justice.gov/crt/about/spl/documents/spd_consentdecree_7-27-12.pdf.

[36] Janet R. Oliva, et al., *A Practical Overview of De-Escalation Skills in Law Enforcement: Helping Individuals in Crisis While Reducing Police Liability and Injury*, 10 J. Police Crisis Negotiations 15, 26 (2010) (describing crisis intervention training as a standard procedure); Michael T. Compton, et al., *Use of Force Preferences and Perceived Effectiveness of Actions Among Crisis Intervention Team (CIT) Police Officers and Non-CIT Officers in an Escalating Psychiatric Crisis Involving a Subject With Schizophrenia*, 37 Schizophrenia Bull. 737, 742 (2009) (noting that CIT training and the CIT model is being swiftly and broadly disseminated in law enforcement agencies across the country).

[37] Olivia, *supra* note 36 (describing crisis intervention as a valuable tool in reducing casualties to both police and subjects in crisis situations); Melissa Reuland & Jason Cheney, Police Exec. Research Forum, *Enhancing Success of Police-Based Diversion Programs for People with Mental Illness* (2005) (finding that for several agencies, CIT implementation has decreased police shootings, assaults and batteries, and "problematic use of force issues"); Betsy Vickers, *Memphis,*

Safety Digest; Salinas Police, Californian (Salinas), June 3, 2014, at A3 ("Salinas police wrapped up a 90-minute standoff with a man said to be suicidal Monday morning by convincing him to toss aside his knife and surrender[.] Members of the Hostage Negotiation Team and the Crisis Intervention Team also arrived on the scene. Both teams are specially trained to deal with people suffering from mental illnesses or developmental disabilities. A Crisis Team supervisor from Monterey County Behavioral Health Division also assisted. Uninjured, the man was taken to a local hospital for psychiatric evaluation.").

C. Police Officers Detaining or Arresting People with Psychiatric Disabilities Should Be Prepared to Take the Disability into Account.

Police departments and police officers should be prepared to use practices designed to improve safety in police encounters with people with psychiatric disability. This is especially true when officers detain individuals for the purpose of involuntary mental health treatment. As the City itself notes, there are tens of thousands of

---

Tennessee, Police Department's Crisis Intervention Team 10 (U.S. Dep't of Justice, Bureau of Justice Assistance, Practitioner Perspectives Ser. No. NCJ 182501, 2000) (crisis intervention in Memphis has led to the reduced use of deadly force, and fewer injuries to officers); Deborah L. Bower, et al., *The Albuquerque Police Department's Crisis Intervention Team: A Report Card*, FBI Law Enforcement Bulletin 2 (Feb. 2001) (reporting that police shootings declined in Albuquerque after introduction of CIT); *see also* Compton, *supra* note 36, at 742 (in study, CIT-trained officers selected actions characterized by a lower use of physical force than non-CIT-trained officers).

involuntary psychiatric detentions annually in California alone. Pet. for Cert. at 22–23. It is common for these detentions to involve sending officers into people's homes. [38] Because the psychiatric detention is involuntary, police may reasonably expect to encounter resistance. That an individual may be resisting detention, even with a weapon, does not make crisis intervention and de-escalation irrelevant or unreasonable. To the contrary, these strategies are designed for the very situation.[39]

---

[38] *See* Cal. Health & Human Servs. Agency, Dep't Health Care Servs., *DHCS 1801, Application for Assessment, Evaluation, and Crisis Intervention or Placement for Evaluation and Treatment* (2014), *available at* http://www.dhcs.ca.gov/formsandpubs/forms/Forms/Mental_Health/DHCS1801_04012014.pdf ("DETAINMENT ADVISEMENT: *If taken into custody at his or her residence, the person shall also be told the following information*[:] . . You may bring a few personal items with you, which I will have to approve. Please inform me if you need assistance turning off any appliance or water. You may make a phone call and leave a note to tell your friends or family where you have been taken.") (emphasis in original).

[39] *See, e.g.*, Vickers, *supra* note 37, at 4 (describing Memphis CIT model as response to September 1987 shooting of young African American man with mental illness armed with a knife), 7–8 (describing CIT approaches for persons with psychiatric conditions who have weapons); Paul Davis, *Crisis Intervention. Law Enforcement,* Providence Journal, Jan. 18, 2015, at 1 (describing CIT training using hypotheticals of persons with weapons); Jennifer Skeem & Lynne Bibeau, *How Does Violence Potential Relate to Crisis Intervention Team Responses to Emergencies?*, Psychiatric Services (Feb. 2008) at 203 (CIT officers used force conservatively, even with subjects who posed an extreme risk of violence, including with armed subjects); Seminole County Sheriff's Office, General Order No. G-52 (Mar. 20, 2006) at 8 and Hillsborough County Sheriff's Office,

The legal obligation the ADA places on public agencies has helped speed the creation and use of police practices that are saving lives and preventing the injury of people with disabilities. *Cf., Bd. of Trustees of the University of Alabama v. Garrett,* 531 U.S. 356, 375 (2001) (Kennedy, J., concurring) ("One of the undoubted achievements of statutes designed to assist those with impairments is that citizens have an incentive, flowing from a legal duty, to develop a better understanding, a more decent perspective, for accepting persons with impairments or disabilities into the larger society.") Creating a special exception to the ADA for arrest or detention would relieve much of that pressure, to the likely long-term detriment of all.

Standard Operating Procedure, Gen. 522.01 (Feb. 8, 2007) at 2 (describing assessment and collection of weapons information as part of CIT response), both available at http://www.cit.memphis.edu/policies.php?page=1; Evan Sernoffsky, *Deadly-Force Situation with a Better End*, S.F. Chron., Sept. 25, 2014, at D1 ("A responding officer found Laffey crouched in the apartment with a 12-inch serrated knife, yelling, I have the knife and don't come near me, Banayat said. Rather than confronting Laffey . . the officer called for backup," retreated to a covered position, and resolved the crisis without deadly force); Ball, *supra*, at II.B.

III. THERE ARE TRIABLE FACT QUESTIONS ON WHETHER THE CITY SHOULD HAVE TAKEN MS. SHEEHAN'S DISABILITY INTO ACCOUNT WHEN DETAINING HER.

A. San Francisco's Position That it is Entitled to Summary Judgment is Inconsistent with the *Arline* Factors That Govern the Direct Threat Analysis.

In this Court, the City of San Francisco relies on the "direct threat" defense to Ms. Sheehan's ADA claim, arguing that it should be relieved of liability as a matter of law. That defense provides that a government agency need not take disability into account if the individual in question "poses a direct threat to the health or safety of others." 28 C.F.R. § 35.139(a). A "direct threat" does not mean *any* risk, but rather a "significant risk" that cannot be eliminated by a modification in approach. 28 C.F.R. § 35.104. The factors used to decide if a direct threat exists were announced by this Court in *School Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273 (1987). Regulations promulgated by the U.S. Department of Justice set out the *Arline* standard:

> In determining whether an individual poses a direct threat to the health or safety of others, a public entity must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that

> the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.

28 C.F.R. § 35.139(b).

To prevail on its motion for summary judgment the City would have to show, not that Ms. Sheehan was "dangerous," Pet. Br. at 28, 29, but rather that its officers made a reasonable judgment, based on the best available objective evidence, that she posed a significant risk to the health and safety of others, given the nature, duration and severity of the risk, the probability that injury would occur, and whether reasonable changes to their approach might have reduced the risk. 28 C.F.R. §§ 35.104, 35.139. In arguing that there is no dispute that Ms. Sheehan posed a significant risk of harm to others, the City largely ignores the last *Arline* factor, whether reasonable modifications to its practices would have mitigated the risk of harm. But that is the issue at the heart of the case: whether officers failed to comply with the ADA when they attempted to detain a woman they knew was in mental health crisis and in need of hospitalization, without using crisis intervention strategies. A jury could certainly conclude that they did.

The City says it is beyond dispute that the officers reasonably concluded that Ms. Sheehan posed a significant risk to others, and sought to detain her without employing crisis intervention strategies, on the basis of the following two judgments: (1) Ms. Sheehan could have been trying to escape out the back window of her second floor

apartment; and (2) Ms. Sheehan could have been gathering up "other knives" or weapons the officers hadn't seen to "mount a new attack" or fortify herself against the officers. Pet. Br. at 29. As to the first judgment, Ms. Sheehan's social worker told the officers that Ms. Sheehan could not get out the back window without a ladder. *Sheehan v. City & Cnty. of S.F.* 743 F.3d 1211, 1218, 1224 n. 8 (9th Cir. 2014).[40]

The second judgment also raises factual questions, most importantly why the officers did not employ crisis intervention techniques. The evidence shows that, when the officers first arrived at the premises, Ms. Sheehan was quiet and contained in her room.[41] A jury could conclude that the officers had the time and the opportunity to implement crisis intervention techniques designed for interaction with a person with a psychiatric disability in crisis. Moreover, the officers could have used the City's own policy for dealing with barricaded suspects in detaining Ms. Sheehan.[42]

The direct threat analysis set forth in this Court's *Airline* decision and adopted by the Department of Justice is the appropriate analysis in

---

[40] Further, as the officers were entering Ms. Sheehan's room the second time, they heard the sirens of backup units en route, moments away, who could have covered the back of the premises, mitigating this stated risk. J.A. Vol. 1 at p. 236 (Dep. Sergeant Kimberly Reynolds).

[41] J.A. Vol. 1 at p. 216 (Dep. Sergeant Kimberly Reynolds).

[42] S.F. Police Dep't, General Order 8.02, Hostage and Barricaded Suspect Incidents (1994); *accord Sheehan*, 743 F.3d at 1224 n. 8 ("the officers could have avoided harm to themselves by retreating a safe distance from the door").

this case. Nevertheless, the United States suggests that this Court carve out an exception in which crisis intervention and related techniques are assumed to not be reasonable if the person with the disability is armed or violent. Br. of the United States at 17–21. But crisis intervention and the other techniques described in this brief have been specifically designed to reduce the dangers involved in the arrest or detention of a person with a psychiatric disability, even if armed and violent.[43] Moreover, the *Airline* analysis already takes into account any particular dangers or exigencies. This Court should not create a presumption that taking disability into account in such situations is *de facto* unreasonable. Such a presumption would only serve to discourage the use of these life-saving techniques.

B. The Writ of Certiorari On the First Question May Have Been Improvidently Granted.

In its Petition, the City asked this Court to resolve a possible Circuit split. Without precisely taking a stand on how that split should be resolved, the City highlighted the Fifth Circuit's analysis in *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000), which held that the ADA does not apply to an officer's "on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life." Pet. for Cert. at 19, 25–28. The suggestion was

---

[43] *See supra* note 39.

apparently that the Ninth Circuit's holding that the ADA applied to the detention involved here was erroneous. The City's opening brief changed course, and explicitly conceded that, as the Ninth Circuit held, the ADA applies to arrests and detention. Pet. Br. at 34. Thus, the parties are now united in the view that the Ninth Circuit was on the right side of any possible split. That makes this case at this point an unsuitable vehicle for exploring a split. Moreover, having conceded that the ADA applies and placing its reliance now on the "direct threat" defense, the case largely turns on whether the particular facts here establish the defense. That of course is not the sort of question this Court ordinarily decides. *See N.L.R.B. v. Hendricks Cnty. Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n. 8 (1981) ("[W]e are presented primarily with a question of fact, which does not merit Court review. The writ of certiorari is therefore dismissed as improvidently granted."). For both of these reasons, the grant of certiorari on the City's first question may well have been improvident.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed, or, in the alternative, the Writ should be dismissed as to the first question.

Respectfully submitted,

Claudia Center
Counsel of Record
Matthew Coles
Susan P Mizner
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
39 Drumm Street
San Francisco, CA 94111
(415) 343-0762
ccenter@aclu.org

Steven R. Shapiro
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

Alan L. Schlosser
ACLU FOUNDATION OF NORTHERN CALIFORNIA
39 Drumm Street
San Francisco, CA 94111

Dated: February 12, 2015

APPENDIX

INTEREST OF *AMICI CURIAE*

The **Arc of the United States**, founded in 1950, is the nation's largest community-based organization of and for people with intellectual and developmental disabilities. The Arc promotes and protects the human and civil rights of people with intellectual and developmental disabilities and actively supports their full inclusion and participation in the community throughout their lifetimes. Through its National Center for Criminal Justice and Disability, The Arc serves as a national clearinghouse for information, training, and advocacy on the topic of people with intellectual and developmental disabilities as victims, witnesses and suspects or offenders of crime. The Arc has appeared as amicus curiae in this Court in a variety of cases involving intellectual and developmental disabilities and has a vital interest in ensuring that all such individuals receive the appropriate protections and supports provided by law and that courts and administrative agencies employ commonly accepted scientific principles for the diagnosis of intellectual and developmental disabilities.

The **American Civil Liberties Union** (ACLU) is a nationwide, non-partisan organization of approximately 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU's Disability Rights Program envisions a society in which discrimination against people with disabilities no longer exists, and in which people understand that disability is a normal part of life. This means a country in which people with disabilities are valued, integrated members of the

community; where people with disabilities have jobs, homes, education, healthcare, and families. This means a country in which people with disabilities are no longer segregated into, and over-represented in, civil and criminal institutions such as nursing homes, psychiatric hospitals, jails and prisons.

The **American Association of People with Disabilities** (AAPD), founded in 1995 and headquartered in Washington, D.C., is the largest national nonprofit disability rights organization in the United States. AAPD promotes equal opportunity, economic power, independent living, and political participation for people with disabilities. Its members, including people with disabilities and family, friends, and supporters, represent a powerful force for change. AAPD advocates for the full implementation of the Americans with Disabilities Act (ADA), the landmark civil rights bill for Americans with disabilities, that supports Americans with disabilities to live and thrive in their communities. AAPD and its members benefit from the protection provided by the ADA against discrimination in the services, programs, and activities provided by state and local government entities, and thus have a direct interest in the outcome of this litigation.

The **American Diabetes Association** is a nationwide nonprofit, voluntary health organization founded in 1940, and has over 485,000 general members, 15,000 health professional members, and 1,000,000 volunteers. The mission of the Association is to prevent and cure diabetes and to improve the lives of all people affected by diabetes. As of 2012, there were 29.1 million Americans with diabetes. The

Association is the largest, most prominent nongovernmental organization that deals with the treatment and impact of diabetes. The Association establishes and maintains the most authoritative and widely followed clinical practice recommendations, guidelines, and standards for the treatment of diabetes. The Association publishes the most authoritative professional journals concerning diabetes research and treatment.

The **Autistic Self Advocacy Network** ("ASAN") is a national, private, nonprofit organization, run by and for individuals on the autism spectrum. ASAN provides public education and promotes public policies that benefit autistic individuals and others with developmental or other disabilities. ASAN's advocacy activities include combating stigma, discrimination, and violence against autistic people and others with disabilities; promoting access to health care and long-term supports in integrated community settings; and educating the public about the access needs of autistic people. ASAN takes a strong interest in cases that affect the rights of autistic individuals to participate fully in community life and enjoy the same rights as others without disabilities.

The **Depression and Bipolar Support Alliance** (DBSA), as the leading national peer-directed organization for individuals living with depression and bipolar disorder, joins the amicus brief to be filed in the U.S. Supreme Court in the case of *Sheehan v City and County of San Francisco*. DBSA advocates with peers at the forefront in determining needs and best practices that advance mental health, personal choice and wellness. We

strongly support the application of evidence-based crisis intervention as a critical tool for police and law enforcement when complying with and enforcing the Americans with Disabilities Act.

Disability Rights Advocates (DRA) is a non-profit public interest legal center that specializes in high impact civil rights litigation and other advocacy on behalf of persons with disabilities throughout the United States. DRA works to end discrimination in areas such as access to public accommodations, public services, employment, transportation, education, employment, technology and housing. DRA's clients, staff and board of directors include people with various types of disabilities. With offices in Berkeley, California and New York City, DRA strives to protect the civil rights of people with all types of disabilities.

Disability Rights Education and Defense Fund, Inc., (DREDF) is a national disability civil rights law and policy organization dedicated to securing equal citizenship for people with disabilities. Since its founding in 1979, DREDF has pursued its mission through education, advocacy and law reform efforts. Nationally recognized for its expertise in the interpretation of federal disability civil rights laws, DREDF has consistently worked to promote the full integration of citizens with disabilities into the American mainstream, and to ensure that the civil rights of persons with disabilities are protected and advanced.

The **Epilepsy Foundation** is a nonprofit corporation founded in 1968 to advance the interests the over 2.8 million Americans with epilepsy and seizure disorders. With its affiliates throughout the

nation, the Epilepsy Foundation maintains and disseminates information about epilepsy and seizures; provides training to law enforcement personnel on how to recognize seizure related behavior and the proper steps to take to ensure everyone's safety. Because a person experiencing a seizure may be perceived as being aggressive or purposefully unresponsive by law enforcement, the Epilepsy Foundation has taken a stance to educate law enforcement officers and first responders on seizure related behavior and advocate for proper policing techniques that do not subject people with disabilities to unreasonable arrests and excessive force. Our organization supports practices and laws, including the Americans with Disabilities Act, that provide safe and nondiscriminatory policing practices for people with disabilities. These policing practices not only protect individuals with disabilities, they also foster and maintain the public's trust in law enforcement officers to protect and serve their communities.

Helping Educate to Advance the Rights of the Deaf (HEARD) is an all-volunteer nonprofit organization that works to identify and remove barriers that prevent deaf people from participating in and having equal access to the justice system. HEARD developed and leads a national campaign to curtail police brutality against deaf individuals; tracks incidences of police brutality against deaf people; and created a national database of deaf detainees and prisoners. HEARD is the only organization in the nation that works to correct and prevent deaf wrongful convictions and end abuse of deaf incarcerated individuals.

Mental Health America (MHA), formerly the National Mental Health Association, is a national membership organization composed of individuals with lived experience of mental illnesses and their family members and advocates. The nation's oldest and largest nonprofit mental health organization, MHA has over 200 affiliates who are dedicated to improving the mental health of all Americans, especially the 54 million people who have severe mental disorders. Through advocacy, education, research, and service, MHA helps to ensure that people with mental illnesses are accorded respect, dignity, and the opportunity to achieve their full potential. MHA is particularly concerned that careful crisis intervention procedures be used in taking a person in acute emotional distress into custody and that a remedy be available when police fail to do so.

The **National Association of the Deaf** (NAD), founded in 1880, is the oldest civil rights organization in the United States, and is the nation's premier organization of, by and for deaf and hard of hearing individuals. The mission of the NAD is to preserve, protect, and promote the civil, human and linguistic rights of 48 million deaf and hard of hearing individuals in the country. The NAD endeavors to achieve true equality for its constituents in all aspects of society including but not limited to education, employment, and ensuring full access to programs and services. Serving all parts of the USA, the NAD is based in Silver Spring, MD and more information is available at: www.nad.org

The mission of the **National Coalition for Mental Health Recovery** (NCMHR) is to "ensure that consumer/survivors have a major voice in the development and implementation of health care, mental health, and social policies at the state and national levels, empowering people to recover and lead a full life in the community." As people with psychiatric disabilities who are disproportionately affected when law enforcement fails to take disability into account when responding, we have a keen interest in ensuring that Title II of the Americans with Disabilities Act (ADA) is upheld, requiring reasonable modifications of police practices and requiring that police use proven crisis intervention and de-escalation practices in interaction with persons with disabilities or anyone suspected of having a disability.

The **National Council for Behavioral Healthcare** represents 2,250 behavioral healthcare organizations that serve our nation's most vulnerable individuals—more than 8 million adults and children with mental illnesses. The National Council promotes public policies that improve and strengthen mental health and addictions treatment by promoting access to high-quality, cost-effective community-based treatment and supports. The National Council also works to improve the police response to people with mental illness. The National Council believes that police departments should adopt crisis intervention and de-escalation practices that enhance the safety of people with disabilities, police officers, and the public.

The **National Council for Independent** (NCIL) is America's oldest cross-disability, grassroots organization run by and for people with disabilities. Founded in 1982, NCIL represents more than 700 organizations and individuals from every state and territory, including Centers for Independent Living (CILs), Statewide Independent Living Councils (SILCs), individuals with disabilities, and other organizations that advocate for the rights of people with disabilities throughout the United States. NCIL envisions a world in which people with disabilities are valued equally and participate fully. NCIL is vitally interested in protecting rights gained in the Americans with Disabilities Act and in advancing safe and effective police practices affecting people with disabilities.

The **National Disability Rights Network** ("NDRN"), is the non-profit membership association of protection and advocacy ("P&A") agencies that are located in all 50 states, the District of Columbia, Puerto Rico, and the United States Territories. There is also a federally mandated Native American P&A System. P&A agencies are authorized under various federal statutes to provide legal representation and related advocacy services, and to investigate abuse and neglect of individuals with disabilities in a variety of settings. The P&A System comprises the nation's largest provider of legally-based advocacy services for persons with disabilities. NDRN supports its members through the provision of training and technical assistance, legal support, and legislative advocacy, and works to create a society in which people with disabilities are afforded equality of opportunity and are able to fully participate by exercising choice and self-determination.

The **National Down Syndrome Congress** represents families and friends of individuals with Down syndrome. Our membership is comprised of 200 affiliates in 50 states. The mission of the NDSC is to create a national climate in which all people will recognize and embrace the value and dignity of people with Down syndrome so that individuals with DS will live in a world with equal rights and opportunities. The NDSC has worked tirelessly to improve the police response for people with DS and all disabilities following the tragic death of Ethan Saylor at the hands of Frederick County police officers in 2013. NDSC has promoted and participated in efforts throughout the country to educate affiliates and the public at large to change the present culture of police practices to recognize the needs and rights of individuals with disabilities.

The **National Federation of Families for Children's Mental Health** is a nonprofit, advocacy organization that bridges the voices of families raising children and youth with mental health challenges. Unfortunately, our families are not foreign to experiences of police misconduct when it comes to individuals living with mental health disorders. We would like to see effective crisis intervention and de-escalation practices applied when responding to individuals who may be experiencing a mental health crisis. It is our duty to protect our children and other individuals living with disabilities from harmful, fatal practices.

The **National Federation of the Blind** ("NFB") is the largest organization of blind and low-vision people in the United States. Founded in 1940, the NFB has grown to over fifty-thousand members. The organization consists of affiliates and local chapters in every state, the District of Columbia, and Puerto Rico. The NFB devotes significant resources toward advocacy, education, research, and development of programs to integrate the blind into society on terms of equality and independence, and to remove barriers and change social attitudes, stereotypes and mistaken beliefs about blindness that result in the denial of opportunity to blind people. The NFB actively engages in litigation and advocacy to protect the civil rights of the blind under our nation's laws.

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
FEB 17 2015
OFFICE OF THE CLERK

No. 13-1412

IN THE
Supreme Court of the United States

CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, ET AL.,
Petitioners,

v.

TERESA SHEEHAN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMERICAN PSYCHIATRIC ASSOCIATION, AMERICAN PSYCHOLOGICAL ASSOCIATION, DELAWARE, ILLINOIS, NEW MEXICO, OHIO, AND VERMONT PSYCHOLOGICAL ASSOCIATIONS, NATIONAL COUNCIL ON DISABILITY, NATIONAL ALLIANCE ON MENTAL ILLNESS, AND JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

DAVID W. OGDEN
DANIEL S. VOLCHOK
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000
Counsel for American Psychological Association, and Delaware, Illinois, New Mexico, Ohio, and Vermont Psychological Associations

AARON M. PANNER
Counsel of Record
THOMAS B. BENNETT*
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
* Admitted to practice only in New York; work supervised by members of the Firm

February 17, 2015

(Additional Counsel Listed On Inside Cover)

IRA A. BURNIM
ALISON N. BARKOFF
JUDGE BAZELON CENTER
FOR MENTAL HEALTH LAW
1101 15th Street N.W.
Suite 1212
Washington, D.C. 20005
(202) 476-5730

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION 4

STATEMENT 5

SUMMARY OF ARGUMENT 22

ARGUMENT 23

I. THE ADA REQUIRES REASONABLE ACCOMMODATIONS FOR MENTAL ILLNESSES AT THE POINT OF ARREST 23

A. ADA's Application to Arrests Is Not Disputed 23

B. At Least in the Context of Involuntary Civil Commitment, the Question of Reasonable Accommodation Addresses the Entire Encounter Between Law Enforcement and an Individual with Mental Illness 25

II. REQUIRING POLICE TO ACCOMMODATE INDIVIDUALS WITH MENTAL ILLNESS IS PRACTICABLE 29

A. Programs Such as CIT Improve Police Response to Situations Involving Individuals with Mental Illness 30

B. Partnerships with Mental Health Professionals Promote Officer Safety and Save Money 33

CONCLUSION 36

TABLE OF AUTHORITIES

Page

CASES

Addington v. Texas, 441 U.S. 418 (1979) 25

Brown v. Plata, 131 S. Ct. 1910 (2011) 11

Pennsylvania Dep't of Corr. v. Yeskey, 524 U.S. 206 (1998) 24

PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001) 23

United States v. Georgia, 546 U.S. 151 (2006) 24

STATUTES, REGULATIONS, AND RULES

Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* ..... *passim*

42 U.S.C. § 12131(1) 24

42 U.S.C. § 12132 24

42 U.S.C. § 12182(b)(2)(A)(ii) 24

42 U.S.C. § 12182(b)(3) 28

Cal. Welf. & Inst. Code § 5150(a) 25

28 C.F.R.:

§ 35.130(b)(7) 24

§ 35.139(b) 28

Sup. Ct. R.:

Rule 37.3(a) 1

Rule 37.6 1

OTHER MATERIALS

Paul S. Appelbaum, *The 'Quiet' Crisis In Mental Health Services*, 22 Health Affairs 110 (2003), http://content.healthaffairs.org/content/22/5/110.full.pdf+html 8

Colleen L. Barry et al., *After Newtown – Public Opinion on Gun Policy and Mental Illness*, 368 New Eng. J. Med. 1077 (2013), http://www.nejm.org/doi/pdf/10.1056/NEJMp1300512 15

Herbert Bengelsdorf et al., *The Cost Effectiveness of Crisis Intervention*, 181 J. Nervous & Mental Disease 757 (1993), http://www.researchgate.net/publication/14945620_The_cost_effectiveness_of_crisis_intervention._Admission_diversion_savings_can_offset_the_high_cost_of_service 34-35

Randy Borum et al., *Police Perspectives on Responding to Mentally Ill People in Crisis: Perceptions of Program Effectiveness*, 16 Behavioral Sci. & L. 393 (1998) 10, 30, 33

Kelly Bouchard, *Across Nation, Unsettling Acceptance when Mentally Ill in Crisis Are Killed*, Portland Press Herald, Dec. 9, 2012, http://www.pressherald.com/2012/12/09/shoot-across-nation-a-grim-acceptance-when-mentally-ill-shot-down/ 9, 13

Deborah L. Bower & W. Gene Pettit, *The Albuquerque Police Department's Crisis Intervention Team: A Report Card*, 70 FBI Law Enforcement Bull. 1 (Feb. 2001), http://leb.fbi.gov/2001-pdfs/leb-february-2001 33-34

Kelli E. Canada et al., *Intervening at the Entry Point: Differences in How CIT Trained and Non-CIT Trained Officers Describe Responding to Mental Health-Related Calls*, 48 Community Mental Health J. 746 (2012) 8, 10, 17, 26, 31, 32, 33, 34

City & County of San Francisco Police Dep't, Police Commission Minutes of Regular Meeting, Feb. 9, 2011, http://www.sf-police.org/Modules/ShowDocument.aspx?documentid=25386 15

Community Behavioral Health Services, San Francisco Dep't of Health, *Involuntary Detention Training Manual* (Apr. 2010), https://www.sfdph.org/dph/files/CBHSdocs/5150Manual042010.pdf..... 10

Michael T. Compton et al., *A Comprehensive Review of Extant Research on Crisis Intervention Team (CIT) Programs*, 36 J. Am. Acad. Psychiatry & L. 47 (2008), http://www.jaapl.org/content/36/1/47.full.pdf+html 16, 17, 18, 31, 33, 34, 35, 36

Michael T. Compton et al., *System- and Policy-Level Challenges to Full Implementation of the Crisis Intervention Team (CIT) Model*, 10 J. Police Crisis Negotiation 72 (2010), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2990634/pdf/nihms195775.pdf 35-36

Michael T. Compton et al., *The Police-Based Crisis Intervention Team (CIT) Model: II. Effects on Level of Force and Resolution, Referral, and Arrest*, 65 Psychiatric Services 523 (2014) 31, 32

Gary Cordner, U.S. Dep't of Justice, Office of Community Oriented Policing Services, *People with Mental Illness* (May 2006), http://ric-zai-inc.com/Publications/cops-p103-pub.pdf 5

Llewellyn J. Cornelius et al., *Reach out and I'll Be There: Mental Health Crisis Intervention and Mobile Outreach Services to Urban African Americans*, 28 Health & Soc. Work 74 (2003) 20

Council of State Gov'ts, *Criminal Justice/ Mental Health Consensus Project* (June 2002), https://www.ncjrs.gov/pdffiles1/nij/grants/197103.pdf 7, 19, 20

Alexander J. Cowell et al., *The Cost-Effectiveness of Criminal Justice Diversion Programs for People With Serious Mental Illness Co-Occurring With Substance Abuse*, 20 J. Contemp. Crim. Justice 292 (2004) 34, 35

Randolph Dupont & Sam Cochran, *Police Response to Mental Health Emergencies—Barriers to Change*, 28 J. Am. Acad. Psychiatry & L. 338 (2000) 33

Peggy L. El-Mallakh et al., *Costs and Savings Associated with Implementation of a Police Crisis Intervention Team*, 107 S. Med. J. 391 (2014) 34

Robin Shepard Engel et al., *Further Exploration of the Demeanor Hypothesis: The Interaction Effects of Suspects' Characteristics and Demeanor on Police Behavior*, 17 Justice Q. 235 (2000) 10

Jenny Gold, *Mental Health Cops Help Reweave Social Safety Net In San Antonio*, Nat'l Pub. Radio, Aug. 19, 2014, http://www.npr.org/blogs/health/2014/08/19/338895262/mental-health-cops-help-reweave-social-safety-net-in-san-antonio 21

Eric Goplerud, U.S. Dep't of Health & Human Servs., Office of Disability, Aging & Long-Term Care Policy, *Consistency of Large Employer and Group Health Plan Benefits with Requirements of the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008* (Nov. 2013), http://aspe.hhs.gov/daltcp/reports/2013/mhpaeAct.pdf 8

Thomas M. Green, *Police as Frontline Mental Health Workers: The Decision to Arrest or Refer to Mental Health Agencies*, 20 Int'l J.L. & Psychiatry 469 (1997) 6, 14

Sonya Hanafi et al., *Incorporating Crisis Intervention Team (CIT) Knowledge and Skills into the Daily Work of Police Officers: A Focus Group Study*, 44 Community Mental Health J. 427 (2008) 32

Michael A. Hoge et al., *Mental Health and Addiction Workforce Development: Federal Leadership Is Needed To Address the Growing Crisis*, 32 Health Affairs 2005 (2013) 8

Steven K. Hoge et al., American Psychiatric Ass'n Task Force Report, *Outpatient Services for the Mentally Ill Involved in the Criminal Justice System* (Oct. 2009), *available at* http://www.psychiatry.org/learn/library--archives/task-force-reports 7

Amy N. Kerr et al., *Police Encounters, Mental Illness and Injury: An Exploratory Investigation*, 10 J. Police Crisis Negotiation 116 (2010) 14

H. Richard Lamb et al., *The Police and Mental Health*, 53 Psychiatric Services 1266 (2002), http://www.popcenter.org/problems/mental_illness/PDFs/Lamb_etal_2002.pdf.....18, 32

Maryland Coalition of Families for Children's Mental Health, *Listening and Learning from Families: Crisis Services and the Experiences of Families Caring for Children and Youth with Mental Health Needs* (Dec. 2013), http://www.mdcoalition.org/images/stories/publications/listening%20and%20learning%20from%20families_final.pdf..... 18

Christian Mason et al., *Responding to Persons with Mental Illness: Can Screening Checklists Aid Law Enforcement?*, FBI Law Enforcement Bulletin (Feb. 2014), http://leb.fbi.gov/2014/february/responding-to-persons-with-mental-illness-can-screening-checklists-aid-law-enforcement 19

Massachusetts Dep't of Mental Health, *Pre-Arrest Law Enforcement Based Jail Diversion Programs* (2015), http://www.mass.gov/eohhs/docs/dmh/forensic/jdp-fact-sheet.pdf 19, 22

Massachusetts Dep't of Mental Health Forensic Services, *Pre-Arrest Law Enforcement-Based Jail Diversion Program Report, July 1, 2011 to January 1, 2014* (2014), http://www.mass.gov/eohhs/docs/dmh/forensic/jail-diversion-program-2014.pdf 20, 35

Mental Health First Aid, http://www.mentalhealthfirstaid.org/cs/ 20

Joseph P. Morrissey & Gary S. Cuddeback, *Jail Diversion, in Clinical Handbook of Schizophrenia* 524 (Kim T. Mueser & Dilip V. Jeste eds., 2008) 11

Mark R. Munetz & Patricia A. Griffin, *Use of the Sequential Intercept Model as an Approach to Decriminalization of People With Serious Mental Illness*, 57 Psychiatric Services 544 (2006), http://ps.psychiatryonline.org/doi/pdf/10.1176/ps.2006.57.4.544 ..... 11, 12

National Alliance on Mental Illness, *The Sequential Intercept Model*, http://www2.nami.org/Template.cfm?Section=CIT&Template=/ContentManagement/ContentDisplay.cfm&ContentID=79159 ..... 11, 12

N.Y.C. Dep't of Health & Mental Hygiene, *Mobile Crisis Teams*, http://www.nyc.gov/html/doh/html/mental/mobile-crisis.shtml 18

Janet R. Oliva & Michael T. Compton, *A Statewide Crisis Intervention Team (CIT) Initiative: Evolution of the Georgia CIT Program*, 36 J. Am. Acad. Psychiatry & L. 38 (2008), http://www.jaapl.org/content/36/1/38.full.pdf+html 16, 17

Order Entering Settlement Agreement, *United States v. Delaware*, No. 11-591-LPS (D. Del. July 15, 2011) 21

Debra A. Pinals, *Forensic Services, Public Mental Health Policy, and Financing: Charting the Course Ahead*, 42 J. Am. Acad. Psychiatry & L. 7 (2014), http://www.jaapl.org/content/42/1/7.full.pdf 8

Melissa Reuland & Jason Cheney, Police Executive Research Forum, *Enhancing Success of Police-Based Diversion Programs for People with Mental Illness* (May 2005), http://gainscenter.samhsa.gov/pdfs/jail_diversion/PERF2.pdf 5, 34

Melissa Reuland et al., Council of State Gov'ts Justice Center, *Law Enforcement Responses to People with Mental Illnesses: A Guide to Research-Informed Policy and Practice* (2009), http://csgjusticecenter.org/wp-content/uploads/2012/12/le-research.pdf 5, 6, 10

Christian Ritter et al., *The Quality of Life of People with Mental Illness: Consequences of Pre-Arrest and Post-Arrest Diversion Programs*, Presented at Second National CIT Conference, Orlando, Fla. (Sept. 2006) 31

Fernanda Santos & Erica Goode, *Police Confront Rising Number of Mentally Ill Suspects*, N.Y. Times, Apr. 2, 2014, at A1 8

Settlement Agreement, *United States v. Delaware*, No. 11-591-LPS (D. Del. filed July 6, 2011), http://www.ada.gov/delaware.htm 21

Ram Subramanian et al., Vera Inst. of Justice, *Incarceration's Front Door: The Misuse of Jails in America* (Feb. 2015), http://www.vera.org/sites/default/files/resources/downloads/incarcerations-front-door-report.pdf 7

Substance Abuse & Mental Health Services Admin., *Funding and Characteristics of State Mental Health Agencies, 2009* (2011), http://store.samhsa.gov/shin/content//SMA11-4655/SMA11-4655.pdf 6

Jeffrey W. Swanson et al., *Mental Illness and Reduction of Gun Violence and Suicide: Bringing Epidemiologic Research to Policy* (2014), http://www.annalsofepidemiology.org/article/S1047-2797(14)00147-1/pdf 14, 15

Kathleen C. Thomas et al., *County-Level Estimates of Mental Health Professional Shortage in the United States*, 60 Psychiatric Services 1323 (2009), http://psychiatryonline.org/doi/pdf/10.1176/ps.2009.60.10.1323 7-8

U.S. Dep't of Justice, Office on the Americans with Disabilities Act, *The Americans with Disabilities Act: Title II Technical Assistance Manual Covering State and Local Government Programs and Services* (1992), http://www.ada.gov/taman2.html#II-2.8000 28

Heidi S. Vermette et al., *Mental Health Training for Law Enforcement Professionals*, 33 J. Am. Acad. Psychiatry & L. 42 (2005), http://www.jaapl.org/content/33/1/42.full.pdf+html 31

Shoshana Walter, *SF Police to Train Crisis Team for Mentally Ill*, The Bay Citizen, Feb. 10, 2011, https://www.baycitizen.org/news/policing/sf-police-train-crisis-team-mentally-ill/ 15

Amy C. Watson et al., *Police Officers' Attitudes Toward and Decisions About Persons With Mental Illness*, 55 Psychiatric Services 49 (Jan. 2004), http://ps.psychiatryonline.org/doi/pdf/10.1176/appi.ps.55.1.49 14-15

William Wells & Joseph A. Schafer, *Officer Perceptions of Police Responses to Persons with a Mental Illness*, 29 Policing 578 (2006) 31

Timothy Williams, *Jails Have Become Warehouses for the Poor, Ill and Addicted, a Report Says*, N.Y. Times, Feb. 11, 2015, at A19 7

INTEREST OF *AMICUS CURIAE*[1]

The American Psychiatric Association ("APA"), with more than 36,000 members, is the Nation's leading organization of physicians who specialize in psychiatry. APA has participated in numerous cases in this Court.

The American Psychological Association is the leading association of psychologists in the United States. A non-profit scientific and professional organization, it has approximately 155,000 members and affiliates. Among its major purposes are to increase and disseminate knowledge regarding human behavior, and to foster the application of psychological learning to important human concerns. The American Psychological Association has filed numerous *amicus* briefs in this Court and other state and federal courts around the country. The Delaware, Illinois, New Mexico, Ohio, and Vermont Psychological Associations are the state-level organizations in their respective States with memberships and missions similar to those of the American Psychological Association.

The National Council on Disability is an independent federal agency charged with advising the President, Congress, and other federal agencies on policies and practices that affect people with

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* also represent that all parties have consented to the filing of this brief by submitting to the Clerk letters granting blanket consent to the filing of *amicus* briefs.

disabilities. Council members are appointed by the President and Congress and are representative of national organizations concerned with individuals with disabilities, providers and administrators of services to individuals with disabilities, individuals engaged in conducting medical or scientific research relating to individuals with disabilities, business concerns, labor organizations, and individuals with disabilities themselves. In furtherance of its duties, the Council systematically gathers and provides decision-makers with information relevant to the implementation of the Americans with Disabilities Act.

NAMI (the National Alliance on Mental Illness) is the nation's largest grassroots mental health organization advocating on behalf of individuals and families affected by mental illness. NAMI has worked for many years with federal, state, and local law enforcement and mental health agencies on crisis intervention team (CIT) programs and strategies to de-escalate mental health crises and reduce adverse outcomes such as deaths and serious injuries. Consequently, NAMI has expertise and a direct interest in the issues under consideration in this case.

The Judge David L. Bazelon Center for Mental Health Law is a national public interest organization founded in 1972 to advance the rights of individuals with mental disabilities. The Center advocates for laws and policies that provide people with mental illness or intellectual disability the opportunities and resources they need to participate fully in their communities. Its litigation and policy advocacy is based on the Americans with Disabilities Act's guarantees of non-discrimination and reasonable accommodation.

The Center has long worked for the diversion of people with mental illness from the criminal justice system and for safer police practices.

Mental health professionals and other advocates for individuals with mental illness have dedicated substantial effort and resources to studying, analyzing, and developing practices to reduce the risks that arise from encounters between law enforcement and persons with mental illnesses. Many such encounters arise from circumstances, like those present in this case, that involve primarily, if not exclusively, the need for *treatment* and that should not lead to criminal justice system intervention. There is accordingly a pressing need for police and other law enforcement personnel to be prepared to intervene to initiate entry into treatment for individuals with acute mental illness – just as they are trained to respond appropriately in other situations requiring medical treatment. Legal rules governing arrests should recognize and provide appropriate incentives for law enforcement authorities to adopt available practices to mitigate risks to individuals with mental illnesses and law enforcement personnel during arrests. *Amici* agree with the court below that such legal rules should include the obligation, under the Americans with Disabilities Act of 1990, to provide reasonable accommodations for individuals with serious mental illness.

INTRODUCTION

The Americans with Disabilities Act of 1990 ("ADA") requires public entities to provide reasonable accommodations for individuals with disabilities, including mental illnesses.[2] In this case, police were called to transport a woman with serious mental illness to a mental health facility for involuntary psychiatric treatment. The Ninth Circuit held that the ADA applied in that circumstance and that – on the view of the facts most favorable to respondent – a jury could find that the police failed to make reasonable accommodations for respondent's serious mental illness.

Encounters between individuals with mental illness and law enforcement officers have become a pervasive feature of police work. On countless occasions, police officers are able to engage successfully with individuals with mental illness and to transport those in need to psychiatric care. We acknowledge the vital role of law enforcement in protecting public safety and the risks that police officers encounter in carrying out their duty. At the same time, stigmatization of individuals with mental illness and failure to implement appropriate practices can lead to tragic loss of life or, as in this case, devastating injury. The purpose of the ADA is to protect individuals like respondent from discrimination, including by requiring reasonable accommodations for mental illnesses. The decision below gives effect to that principle, and this Court, accordingly, should affirm on this issue.

---

[2] As used in this brief, "mental illness" refers to illnesses, like Ms. Sheehan's, that qualify as disabilities under the ADA.

STATEMENT

1. A social worker called a nonemergency police line to seek help in transporting Teresa Sheehan, an individual suffering from schizoaffective disorder, from a group home for persons with mental illness to a specialized mental health facility for 72-hour involuntary commitment. JA97-98. Police are asked to respond to calls like this one on a daily basis.

Increasingly, police are the public entities entrusted with responding to individuals with mental illness. In some cities, police spend more time responding to calls involving mental illnesses than they do investigating burglaries or felony assaults.[3] Florida law enforcement officers transport more individuals for involuntary mental illness examinations than they arrest for either aggravated assault or burglary.[4] Although encounters with individuals with mental illness account for less than one-tenth of all calls, law enforcement officers spend a disproportionate amount of time and resources responding to such calls.[5] In large part because of the scarcity of appropriate community-based mental health treatment

---

[3] *See* Gary Cordner, U.S. Dep't of Justice, Office of Community Oriented Policing Services, *People with Mental Illness* 1 (May 2006) (discussing Lincoln, Nebraska), http://ric-zai-inc.com/Publications/cops-p103-pub.pdf.

[4] *See* Melissa Reuland & Jason Cheney, Police Executive Research Forum, *Enhancing Success of Police-Based Diversion Programs for People with Mental Illness* 1 (May 2005) ("Reuland & Cheney, *Enhancing Success*"), http://gainscenter.samhsa.gov/pdfs/jail_diversion/PERF2.pdf.

[5] *See* Melissa Reuland et al., Council of State Gov'ts Justice Center, *Law Enforcement Responses to People with Mental Illnesses: A Guide to Research-Informed Policy and Practice* 6-7 (2009) ("Reuland, *Law Enforcement Responses*"), http://csgjusticecenter.org/wp-content/uploads/2012/12/le-research.pdf.

options – discussed further below – police officers expend substantial time responding repeatedly to the same subset of individuals believed to have mental illness.[6]

Law enforcement's role in responding to individuals with mental illness has increased over the last several decades. More people with mental illness are living in the community, as treatment models have shifted from long-term care in state psychiatric hospitals to community-based treatment. The number of people institutionalized long-term in state psychiatric hospitals has decreased dramatically since its peak in 1955.[7] State mental health systems now focus the majority of their spending on community-based mental health services. For example, in 1981, States spent 33% of their mental health expenditures on outpatient services; by 2007, the percentage had increased to 71%.[8] But these shifts tell only part of the story. Community-based mental health services are underfunded and overtaxed, with need greatly outstripping available capacity. As a result, mental

---

[6] *See id.* at 7 ("The Los Angeles (Calif.) County Police Department identified 67 people with mental illnesses who had a minimum of five contacts with law enforcement during the first eight months of 2004. This resulted in a total of 536 calls for service during this time period."); Thomas M. Green, *Police as Frontline Mental Health Workers: The Decision to Arrest or Refer to Mental Health Agencies*, 20 Int'l J.L. & Psychiatry 469, 476 (1997) (reporting that Honolulu, Hawaii police officers recognized 94 out of 148 individuals believed to have mental illness "on sight").

[7] *See* Reuland, *Law Enforcement Responses* at 4.

[8] *See* Substance Abuse & Mental Health Services Admin., *Funding and Characteristics of State Mental Health Agencies, 2009*, at 36 (2011), http://store.samhsa.gov/shin/content//SMA11-4655/SMA11-4655.pdf.

health systems are not prepared to address the range of disadvantages – including homelessness and unemployment – that correlate with both mental illness and encounters with police.[9]

The shift toward community-based mental health services has thus been accompanied by a critical shortage of appropriate treatment options for individuals with mental illness, including a lack of outpatient services.[10] One consequence of this shortage of community-based mental health services has been a rise in the number of individuals with mental illness in jails and prisons.[11] Fueled in part by falling state budgets, there is also a lack of appropriately trained mental health professionals, which leads to shortages of care.[12] Discrimination by third-

---

[9] *See* Steven K. Hoge et al., American Psychiatric Ass'n Task Force Report, *Outpatient Services for the Mentally Ill Involved in the Criminal Justice System* 11 (Oct. 2009) ("Hoge, *Outpatient Services*"), *available at* http://www.psychiatry.org/learn/library--archives/task-force-reports; *see also* Council of State Gov'ts, *Criminal Justice/Mental Health Consensus Project* 264-65 (June 2002) ("*Consensus Project*") (noting that individuals with mental illness, particularly in the absence of appropriate treatment options, face chronic disability, unemployment, and homelessness), https://www.ncjrs.gov/pdffiles1/nij/grants/197103.pdf.

[10] *See* Hoge, *Outpatient Services* at 11-12.

[11] *See* Timothy Williams, *Jails Have Become Warehouses for the Poor, Ill and Addicted, a Report Says*, N.Y. Times, Feb. 11, 2015, at A19; Ram Subramanian et al., Vera Inst. of Justice, *Incarceration's Front Door: The Misuse of Jails in America* 12-13 (Feb. 2015), http://www.vera.org/sites/default/files/resources/downloads/incarcerations-front-door-report.pdf.

[12] *See Consensus Project* at 280-81; Kathleen C. Thomas et al., *County-Level Estimates of Mental Health Professional Shortage in the United States*, 60 Psychiatric Services 1323 (2009), http://psychiatryonline.org/doi/pdf/10.1176/ps.2009.60.

party payers of medical care in denying or unfairly restricting reimbursement for mental health services has compounded these problems,[13] an issue that has not yet been resolved by the passage of federal and state laws requiring parity for mental health insurance benefits as compared with general medical benefits.[14]

As a consequence of this shortage, calls like the one in this case – which was precipitated by neither a violent act nor a crime, and which asked police officers to respond to a mental health crisis – have grown increasingly common.[15] As this case illustrates, these situations can present serious risks of harm, including death, to individuals with mental illness and to others. Although statistics are hard

---

10.1323; Michael A. Hoge et al., *Mental Health and Addiction Workforce Development: Federal Leadership Is Needed To Address the Growing Crisis*, 32 Health Affairs 2005 (2013).

[13] *See* Paul S. Appelbaum, *The 'Quiet' Crisis In Mental Health Services*, 22 Health Affairs 110 (2003), http://content.healthaffairs.org/content/22/5/110.full.pdf+html.

[14] *See* Eric Goplerud, U.S. Dep't of Health & Human Services, Office of Disability, Aging & Long-Term Care Policy, *Consistency of Large Employer and Group Health Plan Benefits with Requirements of the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008* (Nov. 2013), http://aspe.hhs.gov/daltcp/reports/2013/mhpaeAct.pdf; Debra A. Pinals, *Forensic Services, Public Mental Health Policy, and Financing: Charting the Course Ahead*, 42 J. Am. Acad. Psychiatry & L. 7 (2014), http://www.jaapl.org/content/42/1/7.full.pdf.

[15] *See* Fernanda Santos & Erica Goode, *Police Confront Rising Number of Mentally Ill Suspects*, N.Y. Times, Apr. 2, 2014, at A1; Kelli E. Canada et al., *Intervening at the Entry Point: Differences in How CIT Trained and Non-CIT Trained Officers Describe Responding to Mental Health-Related Calls*, 48 Community Mental Health J. 746, 746 (2012).

to come by, there have been numerous incidents of police shootings of individuals with mental illness.[16] In addition to the toll on people with mental illness, these incidents – and the ensuing investigative review and assertions of liability – also take a toll on the police and on the broader community.

2. In response to the call from Ms. Sheehan's social worker, Heath Hodge, San Francisco's automated radio dispatch system called Officer Kathrine Holder, an officer with limited experience responding to civil commitment calls, to the scene. JA33, 98-99. Because of her inexperience,[17] Officer Holder called her street sergeant, Kimberly Reynolds, for assistance. *Id.* Sergeant Reynolds, who had never assisted a social worker effecting a civil commitment order, called her Lieutenant and sought guidance. JA219-20.[18]

The fact that officers responding to Mr. Hodge's call may have lacked adequate training is consistent with studies showing that police officers frequently feel inadequately trained to respond to such situa-

---

[16] *See* Kelly Bouchard, *Across Nation, Unsettling Acceptance when Mentally Ill in Crisis Are Killed*, Portland Press Herald, Dec. 9, 2012, http://www.pressherald.com/2012/12/09/shoot-across-nation-a-grim-acceptance-when-mentally-ill-shot-down/.

[17] Mr. Hodge testified that Officer Holder "was not clear about what [he] had called [the police] about, . she didn't seem to . . have a clear understanding of a 5150." JA99.

[18] *Amici* recite these facts, consistent with the applicable summary judgment standard, in the light most favorable to respondent. We recognize that there are at least two sides to the story, and *amici* emphasize that they take no position with regard to what facts a reasonable jury should ultimately find based on all the evidence.

tions.[19] This is so even when, as is true in San Francisco, providing assistance in detaining and transporting individuals with mental illness who are dangerous to self or others or gravely disabled (the standard for civil commitment in California and most States) is a police function.[20] As a result, police officers report that such calls are challenging and difficult to manage.[21] The lack of adequate mental health training for police officers – just one critical tool for responding to individuals in crisis – is particularly problematic because traditional police tactics, such as verbal commands, displays of authority, and threats of physical force, can escalate already-sensitive encounters with individuals with mental illness.[22] That escalation, in turn, can cause individuals, including those with mental illness, to present a more threatening demeanor, which may elicit yet more forceful police responses.[23]

To assist in analyzing and remedying the problems caused by the application of traditional criminal justice system approaches – and in recognition of the role of law enforcement in identifying individuals

---

[19] *See* Randy Borum et al., *Police Perspectives on Responding to Mentally Ill People in Crisis: Perceptions of Program Effectiveness*, 16 Behavioral Sci. & L. 393, 394 (1998).

[20] *See* Community Behavioral Health Services, San Francisco Dep't of Health, *Involuntary Detention Training Manual* 47 (Apr. 2010), https://www.sfdph.org/dph/files/CBHSdocs/5150Manual042010.pdf.

[21] *See id.*; *see also* Reuland, *Law Enforcement Responses* at 3.

[22] *See* Canada, 48 Community Mental Health J. at 747.

[23] *See* Robin Shepard Engel et al., *Further Exploration of the Demeanor Hypothesis: The Interaction Effects of Suspects' Characteristics and Demeanor on Police Behavior*, 17 Justice Q. 235 (2000).

with mental illness and diverting them to treatment[24] – mental health professionals and policy makers have developed a framework known as the Sequential Intercept Model.[25] A key premise of the Sequential Intercept Model is that there are untapped improvements in public health and safety – and potential resource savings – that can result from cooperation between law enforcement and mental health professionals.[26] The Sequential Intercept Model focuses on improving outcomes in part through cooperation between law enforcement and mental health professionals. It identifies five points of "intercept" where the collaboration between law enforcement and mental health professionals can be used to identify and divert to treatment individuals with serious mental illnesses.[27] These points of potential intervention range from initial encounters with police, through courts and jails, to prisons and rehabilitative facilities, including points of intervention available to community supervising entities such as probation and parole.[28] Public entities in several

---

[24] Such problems can present themselves at all stages of the criminal justice system. *See, e.g., Brown v. Plata*, 131 S. Ct. 1910 (2011) (concluding that mental health services in California prisons fell below constitutional standards).

[25] *See generally* Mark R. Munetz & Patricia A. Griffin, *Use of the Sequential Intercept Model as an Approach to Decriminalization of People With Serious Mental Illness*, 57 Psychiatric Services 544 (2006), http://ps.psychiatryonline.org/doi/pdf/10.1176/ps.2006.57.4.544.

[26] *See id.* at 547-48.

[27] *See* Joseph P. Morrissey & Gary S. Cuddeback, *Jail Diversion, in Clinical Handbook of Schizophrenia* 524, 526-28 (Kim T. Mueser & Dilip V. Jeste eds., 2008).

[28] *See id.*; *see also* National Alliance on Mental Illness, *The Sequential Intercept Model*, http://www2.nami.org/Template.

States have used the Sequential Intercept Model to develop interventions for individuals with mental illnesses at various stages of the criminal justice process, but a more systematic approach would foster more comprehensive interventions.[29] These interventions include strategies for screening and assessment to enhance identification of behavioral health conditions, development of closer coordination with community service providers, and development of policies, protocols, and memoranda of agreement to enhance the capacity to meet the needs of individuals with mental illness and direct them toward treatment when appropriate and safe.

Because entrance into the criminal justice system starts with a police encounter, the initial point of contact between police and an individual with mental illness is the best opportunity to identify serious mental illnesses and to ensure that an individual with such a disability can be diverted into treatment.[30] Intervention at the earliest stage is also most critical in part because it is most cost-effective.[31]

When a social worker seeks assistance from law enforcement to bring an individual with mental illness into custody for temporary civil commitment, there is often no imminent threat to public safety. Such a call for assistance is equivalent to a call for medical help, seeking emergency treatment for what is a psychiatric problem. When officers with

---

cfm?Section=CIT&Template=/ContentManagement/ContentDisplay.cfm&ContentID=79159 (last visited Feb. 12, 2015).

[29] *See id.*

[30] *See* Munetz & Griffin, 57 Psychiatric Services at 548.

[31] *See id.*

inadequate training, including because of an absence of policies and procedures to guide them, respond to such a call, an opportunity for "intercept" is lost. When such an encounter leads to incarceration, what began as a call for more intensive treatment ends with the individual being denied effective treatment interventions and instead being punished. Furthermore, responding to such a situation using traditional police tactics may put all parties, including the police officers, in danger. In particular, hundreds of individuals with mental illness are shot and killed by police officers every year.[32] In this case, police were dispatched to transport Ms. Sheehan safely to a medical facility where she could receive treatment. This point of contact between the police and Ms. Sheehan therefore represented not merely a lost point of intercept but rather a step backward. Ms. Sheehan did not need an intercept; she had committed no crime. She needed emergency medical care.

3. When the police arrived at Ms. Sheehan's group home, she was in her own room; she did not engage in any unlawful behavior; until approached by her social worker, she had not threatened anyone; and there was no indication that she was suicidal. JA168.

This fact pattern – no crime, no immediate threat – represents a significant percentage of all police

---

[32] *See* Bouchard, *supra* ("[A] review of available reports indicates that at least half of the estimated 375 to 500 people shot and killed by police each year in this country have mental health problems.").

encounters with individuals with mental illness.[33] Police injuries during encounters with such individuals may be no more frequent than injuries during encounters with others, and, when they do occur, rarely require medical attention.[34] The National League of Cities and other local-government organizations ("NLC"), as *amici* in support of petitioners, argue that "[a]ny encounter with an armed suspect who suffers from a serious mental illness presents a significant risk of suicide as well as an elevated risk of violence to others." NLC Br. 21. Presumably any encounter with an armed suspect presents such risks; most individuals with mental illness, however, are not violent, and most violence is not associated with mental illnesses.[35] Both law enforcement officers and the public nevertheless tend to overestimate the connection between mental illnesses and violence toward others.[36]

---

[33] *See* Green, 20 Int'l J.L. & Psychiatry at 475, 477 (reporting that, for the Honolulu police department, 45.3% of calls involve no crime, and 27.7% involve only disorderly conduct).

[34] *See* Amy N. Kerr et al., *Police Encounters, Mental Illness and Injury: An Exploratory Investigation*, 10 J. Police Crisis Negotiation 116 (2010) (finding rate of police injury in encounters with people with mental illness roughly equal to that for the population at large).

[35] *See* Jeffrey W. Swanson et al., *Mental Illness and Reduction of Gun Violence and Suicide: Bringing Epidemiologic Research to Policy* 2-3 (2014) ("In short, violence is a complex societal problem that is caused, more often than not, by other things besides mental illness."), http://www.annalsofepidemiology.org/article/S1047-2797(14)00147-1/pdf (to be published in Annals of Epidemiology).

[36] *See* Amy C. Watson et al., *Police Officers' Attitudes Toward and Decisions About Persons With Mental Illness*, 55 Psychiatric Services 49, 53 (Jan. 2004) (finding exaggerated police percep-

4. In 2011, in response to a series of officer-involved shootings of persons with mental illnesses, San Francisco announced municipal funding of a Crisis Intervention Team ("CIT"), a special mental health training program for police.[37] CIT units are one way for police departments to serve as an intercept point. As described below, CIT units receive 40 hours of specialized training in responding to mental health crises, including de-escalation techniques and appropriate local treatment facilities.

Despite the existence of such specialized teams, the officers did not request assistance from a CIT or less-than-lethal-force unit until after they entered Ms. Sheehan's room. JA28-29, 61; Pet. Br. 7, 9-10. And, although the non-lethal-use-of-force team had just arrived at the group home, the officers forced re-entry into Ms. Sheehan's room before that team had a chance to assist. JA41.

---

tions of violence among individuals with schizophrenia), http://ps.psychiatryonline.org/doi/pdf/10.1176/appi.ps.55.1.49; Swanson, *Bringing Epidemiologic Research to Policy* at 2 ("[T]he assumption of dangerousness is a key element of th[e] negative stereotype [toward persons with serious mental illnesses such as schizophrenia]."); Colleen L. Barry et al., *After Newtown – Public Opinion on Gun Policy and Mental Illness*, 368 New Eng. J. Med. 1077, 1080 (2013) (finding that 45.6% of respondents believe individuals with mental illness are "by far" more dangerous than others), http://www.nejm.org/doi/pdf/10.1056/NEJMp1300512.

[37] *See* Shoshana Walter, *SF Police to Train Crisis Team for Mentally Ill*, The Bay Citizen, Feb. 10, 2011, https://www.baycitizen.org/news/policing/sf-police-train-crisis-team-mentally-ill/ (last visited Feb. 12, 2015); *see also* City & County of San Francisco Police Dep't, Police Commission Minutes of Regular Meeting, Feb. 9, 2011 (adopting resolution unanimously), http://www.sf-police.org/Modules/ShowDocument.aspx?documentid=25386 (last visited Feb. 12, 2015).

CIT units are the most developed and most prevalent means for police to work with mental health professionals to identify individuals with serious mental illness and to ensure that they are diverted into treatment where appropriate.[38] They are, however, just one potential method for enhancing crisis response for individuals with mental illness. Other models for such collaboration include mental health-based mobile-crisis teams ("MCTs"), co-responder services involving mental health professionals employed by police departments, and partnerships with local mental health emergency rooms; many of these approaches have led to promising and effective practices by police departments to accommodate individuals with mental illness.

CIT programs, for example, involve an intensive 40 hours of training that includes both classroom and experiential role-playing components, for both officers and dispatchers.[39] CIT programs also involve the development of relationships with community mental health centers, which provide emergency

---

[38] *See* Michael T. Compton et al., *A Comprehensive Review of Extant Research on Crisis Intervention Team (CIT) Programs*, 36 J. Am. Acad. Psychiatry & L. 47, 47 (2008), http://www.jaapl.org/content/36/1/47.full.pdf+html.

The CIT model developed out of a pioneering partnership between Dr. Randolph Dupont, a psychiatrist at the University of Tennessee, Memphis, and Major Sam Cochran of the Memphis Police Department. The program was developed in response to a fatal police shooting of a man with a history of mental illness and substance abuse. *See* Janet R. Oliva & Michael T. Compton, *A Statewide Crisis Intervention Team (CIT) Initiative: Evolution of the Georgia CIT Program*, 36 J. Am. Acad. Psychiatry & L. 38, 39 (2008), http://www.jaapl.org/content/36/1/38.full.pdf+html.

[39] *See* Compton, 36 J. Am. Acad. Psychiatry & L. at 47.

assessments and treatment, if necessary. The training component – which is provided by psychiatrists, other mental health professionals, and advocates for individuals with mental illness – focuses on de-escalation techniques and awareness of mental health issues.[40] That training also serves to increase officer knowledge of local mental health services and thereby increase the chances that individuals with serious mental illness will be referred to and receive appropriate mental health care and, as a result, avoid harm.[41] In particular, CIT officers receive specialized training designed to allow them to assess threats caused by mental illnesses differently – and in greater accord with scientific evidence – than do officers without such training, who may respond based on stereotypes about mental illnesses.[42] Once trained, CIT-eligible police officers form specialized teams of first responders that can be dispatched to calls believed to involve individuals with mental illnesses. Because of its flexibility and the fact that it gives police departments the tools they need to be effective first responders without requiring immediate aid from mental health professionals, "CIT is considered by many to be the most rapidly expanding and promising partnership between law enforcement and mental health professionals."[43] There are currently hundreds of CIT programs in the United States, including statewide programs in Connecticut,

---

[40] *See* Oliva & Compton, 36 J. Am. Acad. Psychiatry & L. at 39.

[41] *See id.*

[42] *See* Canada, 48 Community Mental Health J. at 750.

[43] Compton, 36 J. Am. Acad. Psychiatry & L. at 47-48.

Georgia, Iowa, New Mexico, North Carolina, Ohio, Oregon, Tennessee, Texas, and Washington.[44]

Other criminal justice-mental health partnerships, like MCT units, provide community crisis management services based on alternative models. These programs may be particularly helpful for smaller police departments, which may lack sufficient personnel to create dedicated CIT teams. MCT programs involve training teams of mental health professionals – including nurses, social workers, psychiatrists, psychologists, addiction specialists, and peer counselors – to become co-responders alongside traditional first responders.[45] MCTs can be called by dispatchers or, in some jurisdictions, by social workers or family members directly.[46] MCTs can facilitate rapid treatment, hospital admission, and referrals to other mental health providers.[47] MCTs and related programs have been implemented in, among other places, New York City; Birmingham, Alabama; Long Beach, California; San Diego County, California; Anne Arundel County, Maryland; and

---

[44] *See id.* at 48.

[45] *See* N.Y.C. Dep't of Health & Mental Hygiene, *Mobile Crisis Teams*, http://www.nyc.gov/html/doh/html/mental/mobile-crisis.shtml (last visited Feb. 12, 2015).

[46] *See id.* (providing direct 800-number); Maryland Coalition of Families for Children's Mental Health, *Listening and Learning from Families: Crisis Services and the Experiences of Families Caring for Children and Youth with Mental Health Needs* 11 (Dec. 2013) ("If available, mobile crisis was a service that was pursued quite frequently."), http://www.mdcoalition.org/images/stories/publications/listening%20and%20learning%20from%20families_final.pdf.

[47] *See* H. Richard Lamb et al., *The Police and Mental Health*, 53 Psychiatric Services 1266, 1269 (2002), http://www.popcenter.org/problems/mental_illness/PDFs/Lamb_etal_2002.pdf.

statewide in Massachusetts.[48] Although these programs vary in how they structure funding for the mental health professionals who act as responders, they all facilitate referral away from arrest and jail and toward treatment by placing mental health professionals at the scene as soon as possible.[49]

Other programs, like "mental health first-aid" training for police, take a hybrid approach by providing basic mental health training to a broader segment of police officers. Such training focuses on increasing understanding of mental illnesses, decreasing mental health stigma, and promoting

---

[48] *See Consensus Project* at 46; Massachusetts Dep't of Mental Health, *Pre-Arrest Law Enforcement Based Jail Diversion Programs* (2015) ("MDMH, *Jail Diversion Program – 2015*"), http://www.mass.gov/eohhs/docs/dmh/forensic/jdp-fact-sheet.pdf.

[49] *See Consensus Project* at 46. One particular step that police departments can take to better accommodate individuals with mental illness, particularly in conjunction with a more comprehensive training program, is to implement screening checklists. For example, many state and local jails employ "brief jail mental health screening" checklists to identify mental health risks among inmates. Those checklists have proven effective in improving treatment of mental illness in jails, where, according to one estimate, as many as 56% of inmates suffer some form of mental illness. *See* Christian Mason et al., *Responding to Persons with Mental Illness: Can Screening Checklists Aid Law Enforcement?*, FBI Law Enforcement Bulletin (Feb. 2014), http://leb.fbi.gov/2014/february/responding-to-persons-with-mental-illness-can-screening-checklists-aid-law-enforcement (last visited Feb. 12, 2015). Those same checklists show promise in assisting first-responding police officers to identify whether mental illness may play a role in a situation calling for police response. *See id.* The use of mental health checklists can increase public and officer safety and help officers on the scene determine the best approach to resolve tense situations and prevent injury or the need for arrest. *See id.*

early access to help by people with mental illness.[50] These programs complement and enhance the effectiveness of more programmatic mental health first-response strategies, like the CIT and MCT programs discussed above.

5. In this case, police were called for the purpose of bringing respondent in for treatment; in other circumstances, police officers may face questions about whether an individual who has been arrested for a non-violent crime – vagrancy, disturbing the peace, public intoxication – may be exhibiting symptoms of severe mental illnesses such that treatment, rather than criminal justice system intervention, is called for. Training and development of linkages to appropriate community mental health resources can assist officers in such situations. For example, in Baltimore, Maryland, Baltimore Crisis Response, Inc. provides free mental health crisis beds for individuals who do not meet the criteria for involuntary commitment but who nevertheless need treatment and are unable to receive it elsewhere.[51] In San Antonio, Texas, community resources were developed for a specialized drop-off center that police can use to give individuals with mental health or substance abuse needs access to treatment providers in an

---

[50] *See* Massachusetts Dep't of Mental Health Forensic Services, *Pre-Arrest Law Enforcement-Based Jail Diversion Program Report, July 1, 2011 to January 1, 2014*, at 8 (2014) ("MDMHFS, *Jail Diversion Program – 2014*"), http://www.mass.gov/eohhs/docs/dmh/forensic/jail-diversion-program-2014.pdf; *see generally* Mental Health First Aid, http://www.mentalhealthfirstaid.org/cs/ (last visited Feb. 12, 2015).

[51] *See Consensus Project* at 55; *see also* Llewellyn J. Cornelius et al., *Reach out and I'll Be There: Mental Health Crisis Intervention and Mobile Outreach Services to Urban African Americans*, 28 Health & Soc. Work 74 (2003).

efficient manner.[52] Police officers who are aware of such programs can avoid jailing individuals who are homeless for minor violations caused by symptoms of mental illness. In 2011, the Department of Justice reached a settlement agreement with the State of Delaware under the ADA providing, among other things, MCTs and crisis walk-in centers, which are 24-hour "community-based psychiatric and counseling services to people experiencing a mental health crisis," with specific accommodations made for police referrals or drop-offs.[53]

The programs described above have not provided any panacea to the deep problems caused by insufficient mental health services and the responsibilities borne by police officers in responding to mental health crises. All such programs, to be most effective, require continuing training, review for best practices, funding, and oversight. And no one program will solve the problem of mental illness in the criminal justice system or work for all police departments. Given the diversity of community sizes, infrastructures, and resources, law enforcement agencies should have flexibility to implement programs and services that work in their areas. Nevertheless, the literature reflects that these programs have demonstrated positive effects on public health, the use of force, arrest rates for individuals

---

[52] *See* Jenny Gold, *Mental Health Cops Help Reweave Social Safety Net In San Antonio*, Nat'l Pub. Radio, Aug. 19, 2014, http://www.npr.org/blogs/health/2014/08/19/338895262/mental-health-cops-help-reweave-social-safety-net-in-san-antonio.

[53] *See* Settlement Agreement at 5, § II.C.2.c, *United States v. Delaware*, No. 11-591-LPS (D. Del. filed July 6, 2011), http://www.ada.gov/delaware.htm; Order Entering Settlement Agreement, *United States v. Delaware*, No. 11-591-LPS (D. Del. July 15, 2011).

with mental illness, officer safety, police department budgets, and officer attitudes toward individuals with mental illness. As funding for such programs has grown, so too has the number of models for criminal justice-mental health collaborations.[54]

SUMMARY OF ARGUMENT

I. The Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq.*, requires police officers to provide reasonable accommodations for individuals with mental illnesses at the time of arrest. None of the parties asks this Court to conclude otherwise. Encounters with individuals with mental illnesses, many of which involve either no criminal conduct or only nuisance crimes that may reflect the individuals' illnesses, are an everyday part of law enforcement. Preserving the ADA's protection in those encounters is close to the heart of the statute's non-discrimination mandate.

The judgment whether a public entity has provided a reasonable accommodation – and whether an individual is "qualified" within the meaning of the ADA – should take into account the entire encounter between law enforcement and an individual with a mental illness. When police are called to detain and transport an individual for involuntary hospitalization, there is an opportunity to provide reasonable accommodations. And where the alleged failure to make such reasonable accommodations – for example, to provide appropriate training or to employ trained personnel using established protocols – is the partial cause of threatening or violent behavior in an individual suffering from severe mental illness, that individual should not be deprived of the statute's protection.

---

[54] *See* MDMH, *Jail Diversion Program – 2015*, at 2.

II. The obligation to provide *reasonable* accommodations for individuals with mental illness at the time of arrest imposes no unfair burden on public entities. Established approaches to training police officers and implementing programs and procedures designed to reduce the risk to individuals subject to arrest and to law enforcement have been reported to improve law enforcement outcomes without imposing significant additional costs on public authorities.

ARGUMENT

I. THE ADA REQUIRES REASONABLE ACCOMMODATIONS FOR MENTAL ILLNESSES AT THE POINT OF ARREST

A. ADA's Application to Arrests Is Not Disputed

The Ninth Circuit determined that "Title II [of the ADA] applies to arrests." Pet. App. 43. We do not understand any party or *amicus* before this Court to disagree with that proposition,[55] and it is correct.

The ADA is a broadly worded non-discrimination statute. *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 675 (2001) ("[o]ne of the Act's most impressive strengths has been identified as its comprehensive character" making it "a milestone on the path to a more decent, tolerant, progressive society") (internal quotation marks omitted). Title II of the Act, which covers public services, provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be

---

[55] *See* Pet. Br. 20-21; U.S. Br. 7 ("By its plain terms, the provision therefore extends to arrests."); NLC Br. 21-23 (arguing only that accommodation was not reasonable on these facts); *cf.* Int'l Mun. Lawyers Ass'n Br. 21 (arguing for municipal liability for failure to train).

denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. "Discrimination includes a failure to reasonably accommodate a person's disability." Pet. App. 41. Binding regulations adopted by the Department of Justice broadly require that "[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability," unless such modifications would fundamentally change the government activity. 28 C.F.R. § 35.130(b)(7); *cf.* 42 U.S.C. § 12182(b)(2)(A)(ii) (defining discrimination for purposes of Title III of the ADA to include the "failure to make reasonable modifications").

Bringing an individual into custody constitutes a "service[], program[], or activit[y] of a public entity." 42 U.S.C. § 12132; *see also United States v. Georgia*, 546 U.S. 151, 154 (2006) ("'public entity'" includes "'any State or local government'" and "'any department, agency, . or other instrumentality of a State'") (quoting 42 U.S.C. § 12131(1)) (alteration in original). Moreover, the manner in which an arresting officer treats an arrestee or suspect falls comfortably within the broad meaning of "benefit." This Court has previously construed the ADA to apply to prisons, holding that such institutions "fall squarely within the statutory definition of 'public entity.'" *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 210 (1998). In so holding, the Court noted that prisons provide inmates with "'benefits' of 'programs, services, or activities,' as those terms are ordinarily understood." *Id.* That law enforcement provides "benefits" within the meaning of the ADA in the context of effectuating an arrest follows from *Yeskey*.

It is especially clear in the context of this case that petitioners were providing a "benefit" to respondent when they sought to take her into custody for involuntary hospitalization. The statute under which petitioners sought to take respondent into custody authorizes temporary civil commitment when "a[ny] person, as a result of a mental disorder, is a danger to others, or to himself or herself, or gravely disabled." Cal. Welf. & Inst. Code § 5150(a). Among the reasons for civil commitment under this statute – and one of the reasons invoked by respondent's social worker – is to provide aid to an individual who cannot care for herself as a result of a mental illness. *See, e.g., Addington v. Texas*, 441 U.S. 418, 426 (1979) (characterizing civil commitment as an adjunct to "providing care" to individuals with mental illness).

Accordingly, this Court should start from the uncontested premise that the ADA applies to arrests and requires reasonable accommodations in that context.

B. At Least in the Context of Involuntary Civil Commitment, the Question of Reasonable Accommodation Addresses the Entire Encounter Between Law Enforcement and an Individual with Mental Illness

Respondent was, moreover, a "qualified individual" within the meaning of Title II of the ADA. In the circumstances of this case – like many others – respondent was subject to arrest not because of any immediate danger she posed to the public but because of concern that she was gravely disabled and might pose such a danger if untreated. There was – at least on the view of the facts most favorable to respondent – no reason that petitioners could not have provided a reasonable accommodation for

respondent's mental illness when they arrived to transport her to a medical facility.

Petitioners argue that, because of "the danger Sheehan posed to the[] officers . at the time the officers re-opened her door," she was not "qualified" to receive any reasonable accommodation. Pet. Br. 17; *see id.* at 19-23. But that argument improperly narrows the focus of the reasonable-accommodation inquiry, as the Ninth Circuit properly recognized.

In a case involving involuntary civil detention and transportation of an individual who poses no immediate threat, the reasonable-accommodation inquiry should examine the entire course of the encounter between law enforcement and the individual with a disability. Application of ordinary police arrest procedures in such a case would often be inappropriate, and the failure to employ techniques appropriate to dealing with an individual with a known mental illness may be unreasonable. To the extent a public entity fails to employ such techniques, such failure may constitute precisely the sort of discrimination against individuals with disability that the ADA was intended to address.

Applying petitioners' narrow focus would improperly deprive qualified individuals of the statute's protection. As noted above, research shows that ordinary police techniques, including threats of physical force, can render encounters with individuals with mental illness more dangerous to those individuals and to the arresting officer.[56] Unnecessarily subjecting individuals with mental illness to such risks is a clear example of a failure to provide a reasonable accommodation and therefore discrimination

---

[56] *See* Canada, 48 Community Mental Health J. at 747.

within the meaning of the ADA. And an individual should not lose the protection of the statute because a failure to provide reasonable accommodation triggers the very reaction that the reasonable accommodation was designed to prevent.

Amicus NLC argues (at 14-15) that knowing of respondent's mental illness gave the officers no additional ability to predict whether Ms. Sheehan would react violently under the circumstances. That contention is hard to understand on the record of this case – the officers had time to consult with the social worker on the scene and develop an approach that would respond to Ms. Sheehan's psychiatric needs without escalating the situation. In any event, whether, in any given case, circumstances call for any particular accommodation will necessarily depend on the facts. Where there is evidence that a public entity failed to follow established procedures for effectuating involuntary civil commitment, a jury might reasonably conclude that police officers have not provided the accommodations required by the ADA.

Petitioners argue (at 18, 28) that they had no obligation to provide reasonable accommodations for Ms. Sheehan's mental illness because she posed a "direct threat" to their safety. For the reasons explained above, however, petitioners' argument rests on improperly restricting the focus of the reasonable-accommodation inquiry. The obligation to provide reasonable accommodations arose once police were called to transport an individual with a serious mental illness to a facility for treatment, before she represented a direct threat. Moreover, even when a "direct threat" is present, the obligation to provide a "reasonable accommodation" exists as long as police

could allay the threat through reasonable accommodations. *See* 28 C.F.R. § 35.139(b) ("In determining whether an individual poses a direct threat to the health or safety of others, a public entity must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk.").[57] Research and the experience of mental health professionals indicate that there are reasonable accommodations police departments can employ during encounters with individuals with mental illness and that those accommodations can mitigate the risk caused by mental illnesses. To the extent any threat Ms. Sheehan posed could have been mitigated through better training or direct involvement of mental health professionals, Ms. Sheehan did not pose a "direct threat" under Department of Justice regulations.[58]

---

[57] *See also* U.S. Dep't of Justice, Office on the Americans with Disabilities Act, *The Americans with Disabilities Act: Title II Technical Assistance Manual Covering State and Local Government Programs and Services* § II.2-8000 (1992) ("A 'direct threat' is a significant risk to the health or safety of others that cannot be eliminated or reduced to an acceptable level by the public entity's modification of its policies, practices, or procedures, or by the provision of auxiliary aids or services."), http://www.ada.gov/taman2.html#II-2.8000; 42 U.S.C. § 12182(b)(3) (defining "direct threat" as "a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services").

[58] The United States takes a similar position. *See* U.S. Br. 17 n.4 ("Safety concerns also may obviate the need to provide an accommodation in *other* circumstances.") (emphasis added).

The Court should accordingly rule that respondent was a qualified individual entitled to reasonable accommodation under the ADA.

II. REQUIRING POLICE TO ACCOMMODATE INDIVIDUALS WITH MENTAL ILLNESS IS PRACTICABLE

Applying the ADA to arrests of individuals known to be suffering from mental illness is of surpassing importance precisely because encounters between law enforcement and individuals with mental illness are such an integral part of police work. *See supra* pp. 4-8. Requiring state and local governments to provide reasonable accommodations for individuals with mental illness does not impose an unfair burden. What is called for, after all, is *reasonable* accommodation.

Furthermore, imposition of such a duty under the ADA should not mean that law enforcement personnel will be subject to second-guessing when they make reasonable judgments that lead to bad outcomes. *Amici* do not question that police officers face real challenges and, in some cases, real risks in their interactions with individuals with severe mental illnesses (although such risks are often perceived to be greater than they really are). *See supra* pp. 13-14. At the same time, the ADA requires public entities to provide appropriate training and to follow appropriate police practices in their interactions with individuals with mental illnesses, just as they must accommodate other disabilities. Effective partnerships between law enforcement and mental health professionals have been implemented in hundreds of cities nationwide. The evidence is convincing that such programs, when properly funded and managed, improve police interactions with individuals with

mental illness without adding costs or posing risks to officer safety.

A. Programs Such as CIT Improve Police Response to Situations Involving Individuals with Mental Illness

There is clear evidence that CIT program development, with its emphasis on training and community partnerships, increases officers' familiarity and comfort with the mental health system. Other programs have also been shown to have similar effects. As a result, requiring police departments to train their officers and implement programs designed to provide reasonable accommodations would serve the ADA's goals of reducing disparate treatment of individuals with disabilities.

Although a one-size-fits-all model is not workable given differences among jurisdictions, CIT programs have provided an effective model for many cities. The best available evidence of CIT's effectiveness comes from police officers who have received CIT training. One study – which surveyed police officers in Birmingham, Alabama; Knoxville, Tennessee; and Memphis, Tennessee – found that CIT-trained officers were more likely to report that: (a) they were well-prepared to handle individuals with mental health in crisis; (b) the mental health system in general was helpful; and (c) emergency rooms were useful resources.[59] Evidence suggests that most police officers believe that understanding mental illnesses is important to their work, and many of those would welcome an opportunity to learn more

---

[59] *See* Borum, 16 Behavioral Sciences & L. at 401-04.

about how best to work with individuals with mental illness.[60]

These findings are consistent with research showing that CIT-trained officers understand mental illnesses better and are less likely to stigmatize individuals with mental illness. CIT-trained officers assess threats caused by individuals with mental illness differently than do officers without the benefit of CIT training by exhibiting a greater understanding of how mental illnesses can cause individuals to act in ways that might otherwise appear threatening.[61] As a result, CIT-trained officers are more likely to consider alternatives to arrest and jailing and to avoid the use of force. For example, CIT-trained officers are less likely to respond to descriptions of people with schizophrenia with stigmatizing views.[62] CIT-trained officers are also better able to identify mental illnesses and are more knowledgeable about local treatment options for individuals with mental illness.[63] Evidence also suggests that CIT-trained

---

[60] *See* Heidi S. Vermette et al., *Mental Health Training for Law Enforcement Professionals*, 33 J. Am. Acad. Psychiatry & L. 42, 44-45 (2005), http://www.jaapl.org/content/33/1/42.full.pdf+html.

[61] *See* Canada, 48 Community Mental Health J. at 750.

[62] *See* Compton, 36 J. Am. Acad. Psychiatry & L. at 49 & n.12 (citing Christian Ritter et al., *The Quality of Life of People with Mental Illness: Consequences of Pre-Arrest and Post-Arrest Diversion Programs*, Presented at Second National CIT Conference, Orlando, Fla. (Sept. 2006)).

[63] *See* William Wells & Joseph A. Schafer, *Officer Perceptions of Police Responses to Persons with a Mental Illness*, 29 Policing 578 (2006); *see also* Michael T. Compton et al., *The Police-Based Crisis Intervention Team (CIT) Model: II. Effects on Level of Force and Resolution, Referral, and Arrest*, 65 Psychiatric Services 523, 528 (2014).

officers are less likely to employ force when responding to a call involving a person with mental illness.[64]

Research also shows that CIT training is effective at least in part because it persuades officers that taking the time to de-escalate situations with talking and other non-threatening behaviors is the key to success when responding to individuals with mental illness. In particular, CIT-trained officers report that "taking their time is necessary in safely and effectively responding to calls involving mental illness."[65] This additional time helps officers put individuals with mental illness at ease and manage unpredictable situations, and thereby reduce the risk of injury.[66] Other models have also proven effective. Evidence suggests that MCT units are effective at de-escalating police interactions with individuals with mental illness.[67]

Amicus NLC argues (at 16-19) that rigorous empirical evidence demonstrating that CIT training reduces officer injuries or use of force is lacking. That is fair enough; as *amicus* also concedes (at 18), however, research by forensic psychiatrists and psychologists has found positive impacts in attitudinal

---

[64] *See* Canada, 48 Community Mental Health J. at 754; Compton, 65 Psychiatric Services at 525-26.

[65] Canada, 48 Community Mental Health J. at 752.

[66] *See* Sonya Hanafi et al., *Incorporating Crisis Intervention Team (CIT) Knowledge and Skills into the Daily Work of Police Officers: A Focus Group Study*, 44 Community Mental Health J. 427 (2008).

[67] *See* Lamb, 53 Psychiatric Services at 1268 (reporting an arrest rate for MCTs one-third that of traditional police response).

studies.[68] And there is a sound clinical basis for the conclusion that certain types of police techniques may exacerbate the risk of harm to an individual who is being brought into custody.[69] Public authorities across the country have adopted policies that reflect this understanding.[70] It would be a mistake to ignore the consensus of mental health and law enforcement professionals in dealing with individuals with mental illness; that consensus is supported by the extant empirical evidence.

B. Partnerships with Mental Health Professionals Promote Officer Safety and Save Money

Systematic partnerships between law enforcement and mental health professionals, such as CIT, have also been shown to bring substantial benefits to police officers and departments. For example, the best evidence suggests that CIT programs promote rather than compromise officer safety.[71] CIT programs are also associated with less frequent use of SWAT teams when responding to calls involving individuals with mental illness.[72] Many law enforcement agencies

---

[68] *See also* Borum, 16 Behavioral Sciences & L. at 401-04; Compton, 36 J. Am. Acad. Psychiatry & L. at 49 (collecting sources).

[69] *See* Canada, 48 Community Mental Health J. at 747.

[70] *See id.* (noting that more than 400 jurisdictions have adopted CIT programs).

[71] *See* Compton, 36 J. Am. Acad. Psychiatry & L. at 52 (citing Randolph Dupont & Sam Cochran, *Police Response to Mental Health Emergencies—Barriers to Change*, 28 J. Am. Acad. Psychiatry & L. 338 (2000)).

[72] *See id.*; Deborah L. Bower & W. Gene Pettit, *The Albuquerque Police Department's Crisis Intervention Team: A Report Card*, 70 FBI Law Enforcement Bull. 1, 2 (Feb. 2001) (finding

that have implemented CIT programs have reported that the training results in fewer police shootings, assaults, batteries, and "problematic use of force issues."[73]

Many programs achieve the benefits described above without imposing additional costs on the criminal justice system. For example, CIT training leads to lower arrest rates.[74] One study undertook to quantify the cost savings of CIT implementation and found that, for a medium-sized city (Louisville, Kentucky), the cost savings exceeded $1 million annually.[75] Another study found that Memphis, Tennessee's path-breaking CIT program yielded cost savings to the criminal justice system as a result of the program, although with some increased hospitalization expenses.[76] Another study showed that MCTs decrease even costs due to hospitalization.[77]

58% decrease in SWAT team usage), http://leb.fbi.gov/2001-pdfs/leb-february-2001.

[73] Reuland & Cheney, *Enhancing Success* at 7.

[74] *See* Compton, 36 J. Am. Acad. Psychiatry & L. at 51; Canada, 48 Community Mental Health J. at 750 (reporting officer belief that CIT reduces arrests).

[75] *See* Peggy L. El-Mallakh et al., *Costs and Savings Associated with Implementation of a Police Crisis Intervention Team*, 107 S. Med. J. 391 (2014).

[76] *See* Compton, 36 J. Am. Acad. Psychiatry & L. at 51-52 (citing Alexander J. Cowell et al., *The Cost-Effectiveness of Criminal Justice Diversion Programs for People With Serious Mental Illness Co-Occurring With Substance Abuse*, 20 J. Contemp. Crim. Justice 292 (2004) ("Cowell, *Cost-Effectiveness*")).

[77] *See* Herbert Bengelsdorf et al., *The Cost Effectiveness of Crisis Intervention*, 181 J. Nervous & Mental Disease 757, 762 (1993) (finding savings of almost $1,000 per patient whose hospital admission is made unnecessary by timely and effective diversion), http://www.researchgate.net/publication/14945620_

In short, the evidence suggests that specialized programmatic responses to police encounters with individuals with mental illness are associated with at least modest savings for public entities.

Although more research is needed, there is some evidence that such specialized programs can improve mental health outcomes months after a police encounter. The Massachusetts Department of Mental Health Forensic Services has reported that MCT, CIT, co-response, and related programs "help people with mental illness access appropriate treatment, help them live their lives with fewer symptoms, and can provide incentives to stay in treatment thereby minimizing or ending the costly cycling through crisis care."[78] This conclusion is supported by empirical evidence.[79]

As noted above, these gains from police training and specialized response programs depend on good management and secure funding to retain their effectiveness. Even after they are implemented and operational, CIT and related programs face myriad challenges: insufficient dispatcher training, limited availability of emergency psychiatric receiving services, and the difficulty of maintaining CIT readiness in rural areas.[80] Best practices suggest that departments

---

The_cost_effectiveness_of_crisis_intervention._Admission_diversion_savings_can_offset_the_high_cost_of_service.

[78] MDMHFS, *Jail Diversion Program – 2014*, at 4.

[79] *See* Compton, 36 J. Am. Acad. Psychiatry & L. at 52 (noting that CIT programs can materially improve psychiatric symptoms three months after diversion) (citing Cowell, *Cost-Effectiveness*).

[80] *See* Michael T. Compton et al., *System- and Policy-Level Challenges to Full Implementation of the Crisis Intervention Team (CIT) Model*, 10 J. Police Crisis Negotiation 72 (2010)

should attempt to standardize training curricula, create a schedule for periodic review of curricula and program materials, and provide continuing education opportunities for officers who previously completed CIT training.[81]

In sum, the models of criminal justice-mental health collaboration described above provide tangible benefits to individuals with mental illness, police officers, police departments, and communities at large.

CONCLUSION

The judgment of the court of appeals should be affirmed.

(author manuscript available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2990634/pdf/nihms195775.pdf).

[81] *See* Compton, 36 J. Am. Acad. Psychiatry & L. at 52.

Respectfully submitted,

DAVID W. OGDEN
DANIEL S. VOLCHOK
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000
Counsel for American Psychological Association, and Delaware, Illinois, New Mexico, Ohio, and Vermont Psychological Associations

IRA A. BURNIM
ALISON N. BARKOFF
JUDGE BAZELON CENTER
FOR MENTAL HEALTH LAW
1101 15th Street N.W.
Suite 1212
Washington, D.C. 20005
(202) 476-5730

AARON M. PANNER
Counsel of Record
THOMAS B. BENNETT*
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900
* Admitted to practice only in New York; work supervised by members of the Firm

February 17, 2015

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
FEB 17 2015
OFFICE OF THE CLERK

No. 13-1412

In the Supreme Court of the United States

CITY AND COUNTY OF SAN FRANCISCO, KIMBERLY REYNOLDS, AND KATHERINE HOLDER,

Petitioners,

v.

TERESA SHEEHAN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE EUGENE DE BOISE, SR. IN SUPPORT OF RESPONDENT

John Burton
4 East Holly St, Suite 201
Pasadena, CA 91103
626-449-8300
jb@johnburtonlaw.com
Counsel of Record

W. Bevis Schock
7777 Bonhomme Ave. Suite 1300
St. Louis, MO 63105
314-726-2322
wbschock@schocklawcom

Attorneys for Amicus Curiae Eugene De Boise, Sr.

QUESTIONS PRESENTED

1. Whether a Public Entity violates the Americans with Disabilities Act when its officers violate their training by using potentially lethal force on a mentally-ill person they were dispatched to transport for psychiatric evaluation and treatment.

2. Whether police officers violate clearly established Fourth-Amendment law when they violate their training by using potentially lethal force on a mentally-ill person they were dispatched to transport for psychiatric evaluation and treatment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

THE DEATH OF SAMUEL DE BOISE 4

THE SURVIVORS OF MENTALLY-ILL PERSONS INADVERTENTLY KILLED BY POLICE OFFICERS WHO FAIL TO FOLLOW TRAINING SHOULD BE ABLE TO PRESENT ADA CLAIMS TO A JURY 7

POLICE OFFICERS WHO VIOLATE TRAINING WHEN APPREHENDING A MENTALLY ILL PERSON, CAUSING DEATH OR GREAT BODILY INJURY, SHOULD NOT BE ENTITLED TO QUALIFIED IMMUNITY 10

CONCLUSION 18

APPENDIX INDEX i

A. TASER TRAINING SLIDE 1

Controlling/Cuffing Under Power

B. TASER TRAINING SLIDE 2

Avoid Extended or Repeated TASER Device Applications Where Practicable

TABLE OF AUTHORITIES

CASES

Abdullahi v. City of Madison, 423 F.3d 763 (7th Cir. 2005).....3

Anderson v. Creighton, 483 U. S. 635 (1987) 10

Bahl v. Cnty. of Ramsey, 695 F.3d 778 (8th Cir. 2012) 9

Brown v. City of Golden Valley, 574 F.3d 491 (8th Cir. 2009).....11

Champion v. Outlook Nashville, Inc., 380 F.3d 893 (6th Cir. 2004).....3

Cruz v. City of Laramie, 239 F.3d 1183 (10th Cir. 2001).....3

De Boise v. TASER Int'l, Inc., 760 F.3d 892 (8th Cir. 2014)..... *passim*

Deorle v. Rutherford, 272 F.3d 1272, 1282-83 (9th Cir. 2001).....14

Drummond v. City of Anaheim, 343 F.3d 1052 (9th Cir. 2003) 3, 18

Graham v. Connor, 490 U.S. 386 (1989) ..... *passim*

Hickey v. Reeder, 12 F.3d 754 (8th Cir. 1993).....12

Ludwig v. Anderson, 54 F.3d 465 (8th Cir. 1995) 13

Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581 (1999) 8

Sanders v. City of Minneapolis, 474 F.3d. 523 (8th Cir. 2012) 9

Saucier v. Katz, 533 U.S. 194 (2001) 10

Tennessee v. Lane, 541 U.S. 509 (2004) 8

Tolan v. Cotton, 134 S. Ct. 1861, 1866 (2014) 11

CONSTITUTIONAL PROVISION

United States Constitution, Fourth Amendment ..... *passim*

STATUTES

42 U.S.C. § 1983 3

42 U.S.C. § 12132, Americans with Disabilities Act (ADA) ..... *passim*

RULE

U.S. Supreme Court Rule 37 1

OTHER MATERIALS

28 Code of Federal Regulations § 35.130(b)(7) 8

Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People*, 34 Col. Hum. Rts. L. Rev. 261 (2003) 7, 15-16

John Burton & Peter M. Williamson, *Representing Clients Injured by TASER International Electrical Control Devices*, 26 C.R. Lit. & Att'y Fees Annual Handbook 27, 27-28 (2010) 11

Amnesty International, *"Less than Lethal"? The Use of Stun Weapons in US Law Enforcement* (2008).. 16

INTEREST OF AMICUS CURIAE

Amicus curiae is Eugene De Boise, Sr. Mr. De Boise is a petitioner in *De Boise v. St. Louis County*, Supreme Ct. No. 14-812, along with his grandson T.E.R., a minor represented by his next friend, Anneliese Hubbard, and his granddaughter, A.N.D., a minor represented by her next friend, Sheena Marie Perry.[1]

Mr. De Boise's son, Samuel De Boise, who is the father of T.E.R. and A.N.D., died while being taken into custody by St. Louis County police officers. Like the San Francisco officers who shot Respondent Teresa Sheehan, the St. Louis County officers were summoned to assist with taking a mentally-ill subject into custody for psychiatric evaluation and treatment.

Mr. De Boise submits this brief, which parallels his petition for certiorari, to bring to the Court's attention another scenario where law enforcement officers have ignored training, instead resorting to deadly force when dispatched to assist with a person disabled by mental illness.

---

[1] Pursuant to U.S. Supreme Court Rule 37, the parties have lodged consents for the filing of amicus briefs on behalf of Petitioners or Respondent. No counsel for a party authored this brief in whole or in part. No person or entity, other than counsel for amicus curiae, have made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

As mentioned above, amicus curiae Eugene De Boise, Sr. seeks to bring to the Court's attention an example of another too common scenario where law enforcement officers, summoned to assist a person disabled by mental illness, instead either inadvertently kill that person or cause great bodily injury by not following training or common sense.

Samuel De Boise, age 29, was mentally ill and in the throes of a deep and unexpected psychosis. His frightened mother left him alone in the family home while calling 911 for assistance. Six St. Louis County police officers and two paramedics responded to transport Samuel for psychiatric evaluation and treatment.

Samuel walked out the front door naked, proclaiming to be God and Allah. Surrounded by six officers, Samuel obeyed orders to lie down on the lawn, and even put his hands behind his back for cuffing, interlacing his fingers. When no officer moved in with handcuffs, however, Samuel stood up, exclaiming "Yup, Jesus, Got to go!" Two officers fired tasers, shocking Samuel repeatedly over the course of more than two minutes, killing him.

The officers were trained specifically on how to use tasers to control the mentally ill without endangering the subject's health. Each five-second cycle of electricity is designed to create a "window of opportunity" for handcuffing, precisely to avoid the dangerous, multiple cycles that killed Samuel De Boise.

The district court granted summary judgment against Samuel De Boise's family, ruling that the officers had qualified immunity from the 42 U.S.C. § 1983 excessive-force claim, and that St. Louis County did not violate the Americans with Disabilities Act (ADA). A divided panel of the Eighth Circuit affirmed, *De Boise v. TASER Int'l, Inc.*, 760 F.3d 892 (8th Cir. 2014), and rehearing en banc was denied, with four of the ten qualified judges voting in favor.

There are no national data compiled on the number of mentally-ill people inadvertently killed or injured by police officers summoned, often by family members, to transport patients for psychiatric evaluation and treatment. Some involve circumstances similar to Samuel De Boise's death, which, unlike *Sheehan*, did not involve an allegation of a weapon in the hand of the mentally-ill subject, or a decision by an officer to use deadly force. Deaths or great bodily injury also occur because of "non-lethal" techniques such as tasers, chokeholds, pepper spray, hogties, and compression during prone restraints. *See, e.g.*, *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893 (6th Cir. 2004) (pepper spray and chest compressing killing autistic man); *Abdullahi v. City of Madison*, 423 F.3d 763 (7th Cir. 2005) (restraint compression asphyxia of PTSD victim); *Cruz v. City of Laramie*, 239 F.3d 1183 (10th Cir. 2001) (hogtying death of naked and delirious man); *Drummond v. City of Anaheim*, 343 F.3d 1052 (9th Cir. 2003) (chest compression leaving bi-polar schizophrenic in permanent vegetative state).

Amicus curiae Eugene De Boise is familiar with the arguments relating to Ms. Sheehan's ADA and Fourth-Amendment, qualified-immunity claims made in Respondent's Brief and by other amici curiae in support of Respondent. This brief is filed solely for the purpose of illustrating to the Court how the failure to follow procedures by law enforcement officers can, on occasion, cause death or great bodily injury to disabled persons the officers were dispatched to assist. Amicus curiae Eugene De Boise urges the Court to bear in mind that such scenarios occur when establishing the legal parameters governing Ms. Sheehan's claims under the ADA and the Civil Rights Act.

ARGUMENT

THE DEATH OF SAMUEL DE BOISE

Samuel De Boise was afflicted with schizophrenia. On July 8, 2008, he roamed the neighborhood near his family home in St. Louis County, Missouri, wearing no clothes, beating on houses with a stick, and claiming to be God. When he returned home, Samuel held his mother down, and demanded that she worship him.

After Samuel let her go and walked to the back of their house, the mother went to a neighbor's home and called 911 for help with her mentally-ill son. The first officer to arrive watched Samuel walk out the front door, still naked and claiming to be God, and walk back inside, tearing off the screen door in the process. Five more officers arrived. All were told Samuel was schizophrenic.

Two of the officers had a 40-hour course in Crisis Intervention Training (CIT), and were certified by St. Louis County specifically to deal with the mentally ill. They knew that to avoid confusion only one officer should talk to the mentally-ill person, and that the communicating officer should use soothing words to defuse the situation.

For reasons not readily apparent, these six officers ignored their training, as well as common sense, and acted as if they had cornered a homicidal desperado rather than a pathetic, mentally-ill naked man who thought he was a deity rather than a mortal. One armed himself with an AR-15 assault rifle, another a shotgun, a third with a "less-lethal" shotgun loaded with "a sock filled with lead shot," two drew handguns, and the sixth a Model X26 taser.

Samuel walked out the front door, again calling himself God. Still naked, and therefore obviously unarmed, Samuel followed the instructions shouted by multiple officers. Two were in ideal positions – 15 to 25 feet away with four covering officers – to handcuff Samuel quickly and safely. Instead, they delayed until Samuel jumped to his feet and said, "Nope, Jesus, got to go!" One officer fired taser darts into Samuel's torso, delivering five seconds of electric current that caused him to fall backwards, paralyzed, with the electrical current causing his arms to clench to his chest.

According to the training the officers received:

> *Emotionally disturbed*, focused, intoxicated, excited delirium individuals,

> etc. *may not comply with verbal commands following the TASER cycle.*
>
> Each cycle should be used as a "*window of opportunity*" to attempt to establish control/cuff while the subject is affected by the TASER cycle.
>
> *The need for multiple cycles may be avoided by controlling/cuffing under power if contact officers are available.*

Apx A, App 1, "Controlling/Cuffing Under Power" (emphases added).

Instead of following this training and handcuffing during this first "window of opportunity," however, the first officer subjected Samuel to five additional five-second taser cycles, as well as a two-second cycle, before a second officer shot another pair of taser darts into Samuel and discharged four more five-second cycles. According to the X26's "dataport," the computer chip that records discharges, the two officers shocked Samuel with about fifty seconds of electrical current in just over two minutes. Little wonder that he died as a result.

THE SURVIVORS OF MENTALLY-ILL PERSONS INADVERTENTLY KILLED BY POLICE OFFICERS WHO FAIL TO FOLLOW TRAINING SHOULD BE ABLE TO PRESENT ADA CLAIMS TO A JURY

Examples of personal tragedies that have resulted when police officers, who are heavily armed and trained to deal with violent criminals, disregard training and common sense while taking custody of the mentally ill for psychiatric treatment are described in the literature. *See, e.g.,* Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People*, 34 Col. Hum. Rts. L. Rev. 261 (2003) (describing several lethal and near-lethal encounters). *Sheehan*, the De Boise family's petition, and many other cases and news reports demonstrate the ongoing problem of police overreaction to people who, through no choice of their own, are not capable of processing police commands.

Amicus curiae Eugene De Boise urges that the Court affirm that Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132, applies to apprehensions of the mentally ill, and provides the injured with a meaningful remedy in damages where officers violate rules and training designed to protect the mentally ill from death or great bodily injury when being taken into custody for psychiatric evaluation and treatment.

Because there is no argument that the ADA does not apply to law enforcement activities, including arrests, the threshold question is the extent to which officers, when apprehending a mentally-ill person for psychiatric evaluation and treatment, must take into account the fact that due to a psychiatric disability the person may "act out" to varying degrees, and may defy commands that a sane person would obey. A literal reading of the ADA suggests that officers should comply with the reasonable accommodation requirement imposed by Title II. *See Tennessee v. Lane*, 541 U.S. 509, 531-32 (2004); *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 591-92 (1999); 28 Code of Federal Regulations § 35.130(b)(7).

Once one accepts that the ADA applies to apprehensions of persons police officers know to be mentally ill and in need of involuntary psychiatric evaluation and treatment, what remains is a jury issue whether officers fail to accommodate a mental disability as required by the statute. In cases such as *De Boise* a failure to accommodate can be established with evidence that the officers failed to follow training or other objective police standards governing contacts with the mentally ill.

In *De Boise v. TASER Int'l*, the Eight Circuit held that "whether officers reasonably accommodated the individual is 'highly fact-specific and varies depending on the circumstances of each case, including the exigent circumstances presented by criminal activity and safety concerns' and that 'we will not second guess [an officer's] judgments, where

... an officer is presented with exigent or unexpected circumstances.'" 760 F.3d at 899 (quoting *Bahl v. Cnty. of Ramsey*, 695 F.3d 778, 784-85 (8th Cir. 2012).

Second guessing, however, does not arise where, as in *De Boise*, there is evidence that the officers unreasonably failed to accommodate a known disability by disregarding the applicable training. The ADA, of course, should not require an officer to accommodate the disability of someone who is driving a car directly at him, as in *Sanders v. City of Minneapolis*, 474 F.3d. 523 (8th Cir. 2012), but in *De Boise* a jury could determine no such deadly threat existed when the lethal tasings occurred. The officers needed only to follow their training to accommodate Samuel De Boise's mental illness and to avoid ADA liability.

There was nothing unexpected in *De Boise*. Calls to assist with transportation of the mentally ill are a routine, albeit a challenging and sometimes unpleasant, aspect of a police officer's job. Officers, like psychiatric nurses, are trained to handle psychotic persons in ways that minimize the risks of injuries to both the officers and the patients. When officers disregard training by, for example, failing to anticipate that a mentally-ill person might have trouble complying with commands, and failing to minimize taser exposures through use of the "window of opportunity," they do what the ADA forbids, that is deny a mentally disabled person "the benefits of the services, programs or activities of a public entity." 42 U.S.C. § 12132.

Accordingly, amicus curiae Eugene De Boise urges that the Court affirm the Ninth Circuit on Ms. Sheehan's claim for damages under the ADA.

POLICE OFFICERS WHO VIOLATE TRAINING WHEN APPREHENDING A MENTALLY ILL PERSON, CAUSING DEATH OR GREAT BODILY INJURY, SHOULD NOT BE ENTITLED TO QUALIFIED IMMUNITY

When affirming qualified immunity in favor of the officers who killed Samuel De Boise, the Eighth Circuit did not resolve whether tasing a mentally-ill man to death violated the Fourth-Amendment's prohibition against excessive force. Instead, the court addressed only the second prong, whether the right asserted by amicus curiae Eugene De Boise was "clearly established" at the time of his son's death. *De* Boise, 760 F.3d at 896-97.

The Court held last term, however,

> Our qualified-immunity cases illustrate the importance of drawing inferences in favor of the nonmovant, even when, as here, a court decides only the clearly-established prong of the standard. In cases alleging unreasonable searches or seizures, we have instructed that courts should define the "clearly established" right at issue on the basis of the "specific context of the case." *Saucier v. Katz*, 533 U.S. 194, 201 (2001), *see also Anderson v. Creighton*, 483 U. S. 635, 640-641 (1987).

> Accordingly, courts must take care not to define a case's "context" in a manner that imports genuinely disputed factual propositions.

Tolan v. Cotton, 134 S. Ct. 1861, 1866 (2014).

In *De Boise*, the Eighth Circuit majority upheld qualified immunity on the "clearly established" prong, while acknowledging that the officers' conduct may have violated the Fourth Amendment. 760 F.3d at 896 ("Though the outcome of this encounter was tragic, and even if the reasonableness of the officers' actions was questionable, Appellants cannot defeat the officers' defense of qualified immunity.") In so doing, the Eighth Circuit failed to take into account the appropriate "context" of the case – police officers summoned to take custody of a schizophrenic family member for psychiatric evaluation and treatment.

The Eighth Circuit gave undue weight to the use of newer technology, the Model X26 taser, first marketed in 2003 by TASER International, Inc. *See* John Burton & Peter M. Williamson, *Representing Clients Injured by TASER International Electrical Control Devices,* 26 C.R. Lit. & Att'y Fees Annual Handbook 27, 27-28 (2010). Even so, the Eighth Circuit disregarded its own precedent denying qualified immunity for a single unnecessary taser cycle, holding that each discharge "'inflicts a painful and frightening blow, which temporarily paralyzes the large muscles of the body, rendering the victim helpless.'" *Brown v. City of Golden Valley*, 574 F.3d

491, 500 (8th Cir. 2009) (quoting *Hickey v. Reeder*, 12 F.3d 754, 757 (8th Cir. 1993)).

Amicus curiae Eugene De Boise contends that the qualified-immunity "context" of excessive-force claims arising from encounters with mentally-ill people such as Teresa Sheehan and Samuel De Boise should be determined more broadly under the standard for "objective reasonableness" set forth in *Graham v. Connor,* 490 U.S. 386 (1989), with particular attention paid to the specific problems posed by their mental disability.

"Determining whether the force used to effect a particular seizure is reasonable under the Fourth Amendment," under *Graham*, "requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Id.* at 396. *Graham* enumerates three factors bearing on the magnitude of the governmental interests at stake when the decision whether to use force is being made: "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396. In the ordinary encounter with a mentally-ill person, each *Graham* factor will generally cut in favor of minimizing the use of force.

In both *Sheehan* and *De Boise* the officers knew they were confronting a mentally-ill person rather than a criminal. They knew that they were dispatched to take someone to a hospital for psychiatric evaluation and treatment, rather than to

jail for incarceration and prosecution. "[S]tandard police procedure regarding emotionally disturbed persons differs greatly from that regarding emotionally stable persons," and such status "may be relevant to the trial court's determination of objective reasonableness." *Ludwig v. Anderson*, 54 F.3d 465, 472 (8th Cir. 1995). The Court should fashion a rule along the lines articulated by the Ninth Circuit when addressing the application of *Graham* to police confrontations with the mentally ill.

> The problems posed by, and thus the tactics to be employed against, an unarmed, emotionally distraught individual who is creating a disturbance or resisting arrest are ordinarily different from those involved in law enforcement efforts to subdue an armed and dangerous criminal who has recently committed a serious offense. In the former instance, increasing the use of force may, in some circumstances at least, exacerbate the situation; in the latter, a heightened use of less-than-lethal force will usually be helpful in bringing a dangerous situation to a swift end. In the case of mentally unbalanced persons, the use of officers and others trained in the art of counseling is ordinarily advisable, where feasible, and may provide the best means of ending a crisis.... Even when an emotionally disturbed individual is "acting out" and inviting officers to use

> deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted, not with a person who has committed a serious crime against others, but with a mentally ill individual. We do not adopt a per se rule establishing two different classifications of suspects: mentally disabled persons and serious criminals. Instead, we emphasize that where it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining, under *Graham*, the reasonableness of the force employed.

Deorle v. Rutherford, 272 F.3d 1272, 1282-83 (9th Cir. 2001).

The second *Graham* factor, threat to an officer or others, is highly fact specific. In both *De Boise* and *Sheehan* the officers disregarded the specific training they had received to minimize those risks.

In cases such as these, Courts and juries do not need to second guess, with the 20/20 vision of hindsight, split-second decisions of police officers that are consistent with their training. But when officers act contrary to training, in the specific context of encounters with persons known to be mentally ill, they are not being second guessed, they are being held responsible for violating the rule that govern their conduct. That is what the law should do.

Generally, qualified immunity will not be supported by the third *Graham* factor. Neither Samuel De Boise nor Teresa Sheehan posed flight risks.[2] Moreover, the officers were trained to counter such a subject's resistance – clearly the result of mental illness rather than any *mens rea* – without using deadly force. As Professor Avery has explained:

> Modern training materials are remarkably consistent in the approach they recommend to officers who respond to calls involving emotionally disturbed persons. The training is designed to protect the safety of the public, minimize the risks to the safety of the responding officer, and deal with the disturbed person in a humane manner, recognizing that he is ill. One such strategy ... emphasizes the following: "(1) safety, (2) non-threatening approach, (3) control of the scene, (4) defusing the situation, and (5) problem solving."
>
> ....

---

[2] Samuel De Boise was on his front lawn, surrounded by six armed officers, and so could not escape. Ms. Sheehan was in her second-floor apartment, with officers at her door and backup officers able to prevent escape through the only window (assuming Ms. Sheehan wanted to escape). A photograph of that window, available at http://lawanddisorder.org/city-and-county-of-san-francisco-v-sheehan/ (accessed February 11, 2015), shows too long of a drop to the parking lot below for an escape. In both cases, there was no flight risk.

> In many of the reported cases encounters became violent after a subject refused to comply with police directions. In fact, training materials advise officers to be aware that the response of a person of diminished capacity to their orders may be delayed or inappropriate because of his condition.

Unreasonable Seizures of Unreasonable People, 34 Colum. Hum. Rts. L. Rev. at 291-92.

In addition to such training, many modern police department provide officers electrical weapons to control mentally-ill people who are irrational and cannot comply with commands. But the taser itself, if used improperly, can be deadly. Amnesty International identified 334 deaths associated with electrical weapons in the United States from June 2001 through August 2008, most due to cardiac arrests like the one suffered by Samuel De Boise. Amnesty International, *"Less than Lethal"? The Use of Stun Weapons in US Law Enforcement*, (2008).

In response to mounting death reports, starting in 2005 TASER International, Inc., the X26's manufacturer, promulgated specific instructions to minimize exposures, especially to the mentally ill. Police Departments use those TASER materials to train officers. These instructions state that officers should "avoid extended or repeated TASER Device applications where practicable" because "the application of the TASER device is a physically stressful event." Apx B, App 2, "Avoid Extended or

Repeated TASER Device Applications Where Practicable" "Especially when dealing with persons in a health crisis such as excited delirium," according to TASER training, "it is advisable to minimize the physical and psychological stress to the subject to the greatest degree possible." *Id.* "Officers should only apply the number of cycles reasonably necessary to allow them to safely restrain the subject." *Id.*

The TASER materials explain exactly how police officers should minimize exposures: "Move in and control the subject while the TASER device is cycling and the subject is incapacitated."

> Emotionally disturbed, focused, intoxicated, excited delirium individuals, etc. may not comply with verbal commands following the TASER cycle.
>
> Each cycle should be used as a "window of opportunity" to attempt to establish control/cuff while the subject is affected by the TASER cycle.
>
> The need for multiple cycles may be avoided by controlling/cuffing under power if contact officers are available.

Apx 1, App 1, "Controlling/Cuffing Under Power", (emphases added).

Such "training materials are relevant not only to whether the force employed in [a given case] was objectively unreasonable, ... but also to whether reasonable officers would have been on notice that

the force employed was objectively unreasonable." *Drummond v. City of Anaheim*, 343 F.3d 1052, 1062 (9th Cir. 2003).

CONCLUSION

For the foregoing reasons, amicus curiae Eugene De Boise, Sr., respectfully requests that the Supreme Court rule in favor of Sheehan and affirm the decision of the Ninth Circuit.

Respectfully submitted,

John Burton
The Law Offices of John Burton
4 East Holly Street, Suite 201
Pasadena, CA 91103
626-449-8300
jb@johnburtonlaw.com
Counsel of Record

W. Bevis Schock
Attorney at Law
7777 Bonhomme Ave., Ste. 1300
St. Louis, MO 63105
314 726-2322
wbschock@schocklaw.com

February 17, 2015

APPENDIX INDEX

A. Taser Training Slide

Controlling/Cuffing Under Power ..... App 1

B. Taser Training Slide

Avoid Extended or Repeated TASER Device Applications Where Practicable ..... App 2

App 1

A. TASER TRAINING SLIDE

Controlling/Cuffing Under Power

- Move in and control the subject while TASER device is cycling and the subject is incapacitated when it is reasonably safe to do so.
- EDPs, focused, intoxicated, excited delirium individuals, etc. may not comply with verbal commands following the TASER cycle.
- Each cycle should be used as a "window of opportunity" to attempt to establish control/cuff while the subject is affected by the TASER cycle.
- The need for multiple cycles may be avoided by controlling/cuffing under power if contact officers are available

TASER X26 User Training Version 14, released December 1, 2007, slide 142.

App 2

B. TASER TRAINING SLIDE

Avoid Extended or Repeated TASER Device Applications Where Practicable

- The application of the TASER device is a physically stressful event.
- Especially when dealing with persons in a health crisis such as excited delirium, it is advisable to minimize the physical and psychological stress to the subject to the greatest degree possible.
- Officers should only apply the number of cycles reasonably necessary to allow them to safely restrain the subject.
- Current human studies have concluded that TASER applications directly across the chest do not impair normal breathing patterns.
- If circumstances require extended duration or repeated discharges, the operator should take care to observe the subject and provide breaks in the TASER stimulation when practicable.

TASER X26 User Training Version 14, released December 1, 2007, slide 144.

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
JAN 16 2015
OFFICE OF THE CLERK

No. 13-1412

IN THE
Supreme Court of the United States

CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, *et al.*,

Petitioners,

v.

TERESA SHEEHAN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, MAJOR CITIES CHIEFS ASSOCIATION, and NATIONAL SHERIFFS' ASSOCIATION IN SUPPORT OF PETITIONERS

Sarah M. Shalf
Counsel of Record
EMORY LAW SCHOOL
SUPREME COURT
ADVOCACY PROJECT
1301 Clifton Road
Atlanta, Georgia 30322
(404) 712-4652
Sarah.shalf@emory.edu

Charles W. Thompson, Jr.
Executive Director,
General Counsel
INTERNATIONAL
MUNICIPAL LAWYERS
ASSOCIATION
7910 Woodmont Ave.,
Suite 1440
Bethesda, MD 20814
(202) 466-5424

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iv

INTERESTS OF THE *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. TITLE II OF THE ADA REQUIRES CAREFUL ENTITY-LEVEL ANALYSIS OF APPROPRIATE ACCOMMODATIONS IN LIGHT OF AVAILABLE RESOURCES. 4

A. The ADA Was Passed to Address Policies Impacting People with Disabilities 5

B. ADA Claims Commonly Raised in the Context of Arrests Involve Agency Policies that Result in Discrimination 6

C. Title II of the ADA Is Addressed Primarily to Public Entities' Policies and Procedures, Leaving Room for Individuals to Make Reasonable Safety Judgments. 8

II. THE NINTH CIRCUIT'S FOURTH AMENDMENT RULE WOULD UNACCEPTABLY CURTAIL OFFICERS' ABILITY TO RESPOND

TO ACTIVE PUBLIC SAFETY THREATS. 13

A. This Court's Qualified Immunity Jurisprudence Recognizes That Officer Discretion in the Arrest Context Is Critical to Officers' Duty to Secure Public Safety. 13

B. An Individual's Anticipated Resistance Resulting from Mental Illness Is One of Many Factors in a Complex Split-Second Decision, and Should Be Reviewed with the Same Deference as Officer's Other Assessments. 18

C. The Officers' Second Entry into Ms. Sheehan's Residence Was Not Unreasonable, Because Ms. Sheehan's Behavior Supported a Reasonable Belief That Violence Was Imminent. 22

III. APPLICATION OF THE ADA IN THE CONTEXT OF ARRESTS OF VIOLENT, ARMED INDIVIDUALS UNDULY RESTRICTS THE ESTABLISHED DISCRETION OF POLICE OFFICERS. 28

A. Successful Mental Health Crisis Intervention Models Relv Heavilv on the Availabilitv of Local Resources and May Not Resolve

Every Situation Individual Officers Must Face. 29

B. Application of the ADA in the Arrest Context Is Inconsistent with the Discretion Traditionally Afforded Law Enforcement Officers..... 33

CONCLUSION 37

TABLE OF AUTHORITIES

CASES

Alberte v. Anew Health Care Services, Inc., 232 Wis.2d 587 (2000) 9

Ashcroft v. al-Kidd, 131 S.Ct. 2074 (2011) 14

Bahl v. Cnty. of Ramsey, 695 F.3d 778 (8th Cir. 2012) 33

Bates v. Chesterfield Cnty., 216 F.3d 367 (4th Cir. 2000) 19

Brigham City v. Stuart, 547 U.S. 398 (2006) 16

Buchanan v. Maine, 417 F. Supp. 2d 45 (D. Me. 2006) 7

Champion v. Outlook Nashville, Inc., 380 F.3d 893 (6th Cir. 2004) 19

Doe v. Board of Regents of University of Nebraska, 953 F.Supp. 1415 (Neb. 2014) 5

Drummond ex rel. Drummond v. City of Anaheim, 343 F.3d 1052 (9th Cir. 2003) 18

Fitzgerald v. Santoro, 707 F.3d 725 (7th Cir. 2013) 17

Georgia v. Randolph, 547 U.S. 103 (2006) 15

Gohier v. Enright, 186 F. 3d 1216 (10th Cir. 1999) 6, 7

Gorman v. Bartch, 152 F.3d 907 (8th Cir. 1998) 6

Graham v. Connor, 490 U.S. 386 (1989) 14, 18, 36

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 14

McElwee v. Cnty. of Orange, 700 F.3d 635 (2d Cir. 2012) 5

Michigan v. Fisher, 558 U.S.45 (2009) 15, 16, 17, 22

Lamont v. New Jersey, 637 F.3d 177 (3d Cir. 2011) 23

Olmstead v. L.C. ex rel. Zimring,
527 U.S. 581 (1999) 10, 32

Newberry v. East Texas State University, 161 F.3d 276 (5th Cir. 1998) 5

Plumhoff v. Rickard,
134 S.Ct. 2012 (2014) 26, 27

Roberts v. Spielman, 643 F.3d 899 (11th Cir. 2011) 17

Rockwell v. Brown, 664 F.3d 985 (5th Cir. 2011) 19, 26

Ryburn v. Huff,
132 S.Ct. 987 (2012) 15, 16, 24

Saucier v. Katz, 533 U.S. 194 (2001) 20

Scheuer v. Rhodes, 416 U.S. 232 (1974). 13,14

Scott v. Harris, 550 U.S. 372 (2007). 23

Sheehan v. City & Cnty of San Francisco,
743 F.3d 1211 (9th Cir. 2014) 18, 24, 30

State Dept. of Public Safety v. Sexton, 748 So.2d 200 (Ala. Civ. App. 1998) 5

Summerland v. Cnty. of Livingston, 240 F. App'x 70 (6th Cir. 2007) 20

Tennessee v. Garner, 471 U.S. 1 (1985). 23

Tyler v. City of Manhattan, 118 F.3d 1400 (10th Cir.1997) 5

Waterman v. Batton, 393 F.3d 471 (4th Cir. 2005) 24, 25

Wilson v. Gayfers Montgomery Fair Co., 953 F.Supp. 1415 (M.D.Ala.1996). 5

CONSTITUTION AND STATUTES

Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.*:

tit. II, 42 U.S.C. §§ 12131 ..... 6, 8

42 U.S.C. §§ 12132 ..... 6, 8

Rehabilition Act of 1973, 19 U.S.C. § 794 8

REGULATIONS, RULES AND ADMINISTRATIVE MATERIALS

28 C.F.R. § 35.130(h) 11

28 C.F.R. § 35.139(a) 11

Supreme Court Rule 37.6 1

U.S. Department of Justice, Civil Rights Division, *The ADA and City Governments: Common Problems*, (http://www.ada.gov/comprob.htm) 6

MISCELLANEOUS

Amy C. Watson et al., CIT in Context: *The Impact of Mental Health Resource Availability and District Saturation on Call Dispositions*. 34(4) INT'L. J. L. PSYCHIATRY 287 (2011). 31

Henry J. Steadman et al., *A Specialized Crisis Response Site as a Core Element of Police-Based Diversion Programs*, 52(2) PSYCHIATRIC SERVICES 219 (2001) 30, 31

INT'L ASS'N OF CHIEFS OF POLICE NAT'L LAW ENFORCEMENT POLICY CTR., *Responding To Persons Affected by Mental Illness or in Crisis* (Jan. 2014) 34, 35, 36

Michael Compton et al., *Use of Force Preferences and Perceived Effectiveness of Actions Among Crisis Intervention Team (CIT) Police Officers and Non-CIT Officers in An Escalating Psychiatric Crisis Involving a Subject with Schizophrenia*, 37(4) SCHIZOPHRENIA BULLETIN 737 (2011) 32

Questions Mount over Actions of School Psychiatrist, Officer; Missed Warnings Anger Victims' Kin in Theater Rampage, THE BALTIMORE SUN, April 6, 2013, at 12A 22

INTERESTS OF THE *AMICI CURIAE*[1]

The International Municipal Lawyers Association (IMLA) is a non-profit, nonpartisan professional organization consisting of more than 2500 members. The membership is comprised of local government entities, including cities, counties, and subdivision thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters. Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties and special districts.

IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, the Unites States Courts of Appeals, and in state supreme and appellate courts.

---

[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* affirm that no counsel for a party authored this brief in whole or in part, that no counsel or a party made a monetary contribution intended to the preparation or submission of this brief. and no person other than *amici curiae*, their members, or their counsels made a monetary contribution to its preparation or submission.

The parties' letters consenting to the filing of *amicus* briefs are on file with the Court.

The Major Cities Chiefs Association is a professional association of Chief police executives representing the largest cities in the United States, Canada and the UK. MCCA membership is comprised of Chiefs and Sheriffs of the 66 largest law enforcement agencies in the United States, 9 largest in Canada, and 2 in the United Kingdom. MCCA serves 89.9 million people with a sworn workforce of 239,063 officers and non-sworn personnel.

The National Sheriffs' Association (the "NSA") is a non-profit association organized under § 501(c)(4). Formed in 1940, the NSA seeks to promote the fair and efficient administration of criminal justice throughout the United States, and, in particular, to advance and protect the Office of Sheriff throughout the United States. The NSA has over 20,000 members, and is the advocate for 3083 sheriffs throughout the United States.

The NSA also works to promote the public interest goals and policies of law enforcement throughout the nation. It participates in judicial processes where the vital interests of law enforcement and its members are affected.

SUMMARY OF THE ARGUMENT

The Americans with Disabilities Act ("ADA") was intended to address the discrimination that occurs

when policies and methods of service delivery are enacted by those who unthinkingly fail to consider the impact on people with disabilities. The ADA seeks to prevent this discrimination by requiring public entities to develop accommodations at the level of resource management and policy.

By comparison, this Court's jurisprudence with respect to law enforcement actions in arrests affords officers broad discretion in their good-faith, reasonable decision-making based on the facts available at the moment, even if the decision appears incorrect in hindsight. The best method of accommodating people with mental illnesses, and equipping law enforcement officers to handle confrontations with people with mental illnesses safely, is to provide specialized training calibrated to local resources and needs. However, once that training is provided, individual officers should not be required to perform an ADA accommodations analysis when they face urgent public safety risks posed by violent, armed individuals. Instead, they should operate with the broad discretion traditionally afforded under 42 U.S.C. § 1983.

ARGUMENT

I. TITLE II OF THE ADA REQUIRES CAREFUL ENTITY-LEVEL ANALYSIS OF APPROPRIATE ACCOMMODATIONS IN LIGHT OF AVAILABLE RESOURCES.

Congress enacted Title II of the ADA to eradicate discrimination against individuals with disabilities by requiring state and local governments to make reasonable accommodations for persons with disabilities and provide services in the most integrated setting appropriate. The evaluation of an entity's plan for providing services to mentally disabled individuals allows the entity to weigh such factors as the cost of treatment, the entity's budget, and the need for even-handed distribution of services to other disabled individuals. This analysis occurs at the level of policymaking, management and training, and is not suited for application to on-the-street decisionmaking when a law enforcement officer faces an active public safety threat by an armed, violent individual.

A. The ADA Was Passed to Address Policies Impacting People with Disabilities.

Seeing the limited effect of prior disability rights legislation in addressing discriminatory practices and policies, Congress expanded federal protection for individuals with disabilities by passing the ADA in 1990. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.* (2012). The ADA outlined several areas in which it sought to protect against discrimination, including employment, public accommodations, services operated by private entities, and public services. *Id.* at 2–3.

To recover damages in an ADA action, a plaintiff must prove intentional discrimination on the basis of a disability. *See State Dep't of Pub. Safety v. Sexton*, 748 So.2d 200 (Ala. Civ. App. 1998); *Tyler v. City of Manhattan*, 118 F.3d 1400 (10th Cir.1997); *Wilson v. Gayfers Montgomery Fair Co.*, 953 F.Supp. 1415 (M.D.Ala.1996). Under the ADA, discrimination includes failing to make accommodations for the known disabilities of an otherwise qualified individual who requests reasonable accommodations that would allow the plaintiff to perform under the program at issue. *See, e.g.*, *McElwee v. Cnty. of Orange*, 700 F.3d 635, 641 (2d Cir. 2012). As the Nebraska Supreme Court has explained, action taken in response to the plaintiff's conduct is not necessarily discriminatory as long as the "collateral

assessment of disability plays no role" in the action. *Doe v. Bd. of Regents of Univ. of Neb.*, 287 Neb. 990, 1022–23 (2014) (quoting *Newberry v. E. Tex. State Univ.*, 161 F.3d 276, 280 (5th Cir. 1998)).

B. ADA Claims Commonly Raised in the Context of Arrests Involve Agency Policies that Result in Discrimination.

Title II of the ADA applies to any department or instrumentality of State or local government. 42 U.S.C. §§ 12131–32 (2012). Under Title II, public entities cannot exclude from participation in, deny, or discriminate with regards to public benefits, programs, and activities on basis of disability. *Id.* This extends to law enforcement investigation and arrest.

One type of claim for reasonable accommodation during arrest that the courts have addressed under the ADA—and the one primarily at issue in this case—is that, during arrest for a crime unrelated to disability, the police "failed to reasonably accommodate the person's disability in the course of investigation or arrest, causing the person to suffer greater injury or indignity in that process than other arrestees." *Gohier v. Enright*, 186 F 3d 1216, 1220 (10th Cir. 1999); *see also Gorman v. Bartch*, 152 F.3d 907, 912–13 (8th Cir. 1998). This type of claim may arise, for example, when an individual is "unable to

communicate with officers because standard police practices and policies are not appropriately modified," or when the individual is placed at a safety risk because of the procedures. U.S. Dep't of Justice, Civil Rights Div., *The ADA and City Governments: Common Problems*, (http://www.ada.gov/comprob.htm). For instance, a deaf person may need to be handcuffed in a way that allows them to sign, or an epileptic person may need access to their medications. *Id.* The requirement for reasonable accommodation should not extend, however, to individual officers' safety decisions when the individual poses a risk, as opposed to ensuring standard department practices take into account the needs of individuals with disabilities while allowing officers to continue to make the safety judgments they have been afforded under § 1983.

Lack of proper training to quickly recognize a person's disability and adjust procedures in interacting with them can also lead to discrimination. Wrongful arrests of mentally ill individuals may occur because police "misperceived the effects of that disability as criminal activity" (for example, a person with a neurological disorder misidentified as drunk). *Gohier*, 186 F.3d at 1221. However, the federal courts have recognized that an arrest of a disabled suspect is not wrongful when the suspect's actions were unlawful at the time of the arrest. *Id.*; *see also Buchanan v. Maine*, 417 F.Supp.2d 45, 72

(D.Me. 2006) ("One can only reasonably conclude that the officers trained their weapons on plaintiff because he was carrying a high-powered rifle in a crowded shopping area—not because of misperceptions stemming from his disability.").

In this case, San Francisco had established a program intended to address the needs of individuals with mental illness, and trained its officers in recognizing and handling individuals with mental illness. The Plaintiff contends that each individual officer should be responsible for providing accommodations to every suspect, regardless of the threat to public safety, the officer, or the suspect herself. The plaintiff does not contend that San Francisco's training and policies in general were lacking.

C. Title II of the ADA Is Addressed Primarily to Public Entities' Policies and Procedures, Leaving Room for Individuals to Make Reasonable Safety Judgments.

Notably, the language of Title II focuses on the decisions and policies of the public entity: "[N]o qualified individual with a disability shall, by reason of such disability, be subjected to discrimination by any such entity." 42 U.S.C. § 12132. The parties acknowledge that government officials may not be sued in their individual capacities under Title II of the ADA. *Id.* § 12131; *see also* Rehabilitation Act of

1973, 29 U.S.C.A. § 794. The structure of liability under the statute establishes that the primary purpose of Title II is to govern entities' management-level policies and procedures, with the ultimate effect of increasing individual agents' awareness of disability in their implementation of those policies.

The legislative history of the ADA also confirms the conclusion that Congress did not contemplate the implementation decisions of individual agents as primary accommodations under the ADA. The Senate Committee on Labor and Human Resources investigated the potential regulatory impact of the ADA and, "[a]lthough a Senate rule requires that such reports evaluate a bill's expected impact on individuals as well as businesses, the report did not mention any anticipated impact on individuals." *Alberte v. Anew Health Care Servs., Inc.*, 232 Wis.2d 587, 596 (2000) (citing S.Rep. No. 116, 101st Cong., 1st Sess. 88 (1989)). This silence underscores the notion that in rejecting individual liability for failure to provide accommodations, Congress was primarily concerned with the entity-level policies individuals would be tasked with implementing.

The analysis of reasonable accommodations focuses on an entity's management-level assessment, in light of an overall view of the entity's programs. This assessment does entail some individual decisionmaking during implementation, but this

Court has recognized that such decisionmaking must balance the need for accommodations with disability-neutral public concerns. This Court has recognized, for instance, that, while government agencies cannot avoid providing appropriate services to the mentally ill altogether based on budget concerns, they may demonstrate ADA compliance by establishing a carefully considered plan that might nonetheless fail to provide immediate appropriate treatment for everyone who qualifies. In *Olmstead*, when two developmentally disabled women with mental illness sought to be moved from Georgia's public psychiatric hospital into community care, for which they had been evaluated and determined to be qualified, the state argued that moving these women into community care was financially impracticable. *Olmstead v. L.C. by Zimring*, 527 U.S. 581, 593–96 & n.7 (1999). In rejecting the state's defense, the Court held that once individuals with mental disabilities are found to be "qualified" for less restrictive care, failing to give them such is discrimination by reason of disability. *Id.* However, the Court recognized that an exception exists when, "in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities." *Id.* at 604. Determining whether this defense applies requires

case-by-case assessment of the cost of the treatment against the state's overall mental health budget. *Id.*

DOJ regulations clearly state that safety concerns may be an important counter-consideration in the design of accommodations. The regulations permit public entities to "impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities," so long as they "are based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities." 28 C.F.R. § 35.130(h) (2014). The ADA, as directed to both entity-level policymaking and individual implementation, primarily seeks to combat "speculation, stereotypes, or generalizations" that often result in intentional discrimination, not to require specific accommodations that directly threaten public safety.

Furthermore, the regulations do not require a public entity "to permit an individual to participate in or benefit from the services, programs, or activities when that individual poses a direct threat to the health or safety of others." 28 C.F.R. § 35.139(a) (2014). This exception underscores the preeminence of public safety in the accommodations process, especially as applied to armed, violent individuals. In promulgating the regulation, DOJ recognized the context-dependent and discretionary nature of the task facing an entity as it determines

whether an individual poses such a threat. *Id.* When a trained police officer makes a similar individualized assessment when deciding how to apply the department's protocol to an armed, violent individual, she must be afforded the discretion to respond to the dangerous situation she faces.

Title II of the ADA, and its implementing regulations, were aimed at eradicating public entities' policies and procedures that exclude individuals from their programs or discriminate on the basis of disability. While these policies and procedures require individual judgment as they are implemented, they are aimed at increasing individual agents' awareness of disability so as to prevent discrimination against disabled individuals, rather than at mandating that individual officers put the public at risk by analyzing a complex series of accommodations without regard to the exigencies of a particular context. An application of the ADA that would strip away the discretion afforded individual officers facing dangerous situations under the Fourth Amendment and § 1983 is found nowhere in the statute, its regulations, or the jurisprudence interpreting it, and would pose grave impediments to officers' ability to secure public safety.

II. THE NINTH CIRCUIT'S FOURTH AMENDMENT RULE WOULD UNACCEPTABLY CURTAIL OFFICERS' ABILITY TO RESPOND TO ACTIVE PUBLIC SAFETY THREATS.

This Court grounds its qualified immunity jurisprudence in the recognition that active executive decision-making is essential to the public interest. Fourth Amendment jurisprudence reiterates this principle by underscoring that police officers, in addition to receiving qualified immunity, are entitled to broad discretion in making an arrest, especially when the suspect is armed and poses a threat to the public. Application of the ADA's thoughtful, entity-wide analysis to an individual officer's split-second decisionmaking during an arrest is inconsistent with both the entity-focused analysis of the ADA and the broad discretion this Court has typically granted individual officers on the street.

A. This Court's Qualified Immunity Jurisprudence Recognizes That Officer Discretion in the Arrest Context Is Critical to Officers' Duty to Secure Public Safety.

This Court's grounds its qualified immunity jurisprudence in the recognition that "the public interest requires decisions and action to enforce laws for the protection of the public." *Scheuer v. Rhodes*,

416 U.S. 232, 241 (1974). This recognition has given rise to a wide berth of discretion for official decisionmaking. In reaffirming the concept of qualified immunity in *Harlow v. Fitzgerald*, the Supreme Court stated that government officials "performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. 800, 818 (1982). Indeed, an officer is only held liable for his official actions when every "reasonable official would have understood that what he is doing violates that right." *Ashcroft v. al-Kidd*, 131 S.Ct. 2074, 2078 (2011).

Deference to officers' discretion is particularly strong in the context of arrest. Not only are officers afforded qualified immunity when exercising discretionary duties relating to an arrest, but also the reasonableness of the arrest itself—the underlying Fourth Amendment claim—is judged "from the perspective of a reasonable officer on the scene," rather than that of an officer with perfect knowledge of all facts. *Graham v. O'Connor*, 490 U.S. 386, 396 (1989). The particular need to protect public safety when a suspect's actions present an imminent threat of violence, whether to the public, the officers, or the suspect herself, has given rise to the emergency aid and exigent circumstances exceptions

to the warrant requirement and influenced the scope of the reasonableness attributed to officers during the excessive force inquiry.

Uncertainty about the exact nature or likelihood of the risk at issue does not render an officer's response to a public safety threat unreasonable. In *Michigan v. Fisher*, the Court noted that "[o]fficers do not need ironclad proof of 'a likely serious, life-threatening' injury to invoke the emergency aid exception." 558 U.S. 45, 49 (2009). Instead, when the danger posed by the individual is uncertain, it is precisely this need to ascertain the threat to the public that triggers the officers' duty to intervene, even at risk to their own lives. This Court has stated that "so long as they have good reason to believe such a threat exists, it would be silly to suggest that the police would commit a tort by entering to determine whether violence (or threat of violence) has just occurred or is about to (or soon will) occur." *Georgia v. Randolph*, 547 U.S. 103, 118 (2006).

Similarly, an imminent threat to public safety may exist even when the subject has not yet engaged in criminal behavior. In *Ryburn v. Huff*, the officers announced themselves at the home of a teenager rumored to have threatened to "shoot up" his high school. 132 S.Ct. 987, 988 (2012). When no one answered the door, the officers called the student's mother to ask whether there were guns in the house,

but the student's mother, who indicated she was in the house with the student, abruptly hung up the phone. *Id.* The mother then came out of the front door, refused to allow the officers to interview her son inside, and on being asked whether there were guns in the house, ran back into the house. *Id.* at 989. The officers entered the house behind her. *Id.* In rejecting the Ninth Circuit's determination that "the officers really had no reason to fear for their safety or that of anyone else," this Court noted that "[i]t should go without saying that there are many circumstances in which lawful conduct may portend imminent violence," thus justifying the officers' belief that warrantless entry was lawful. *Id.* at 991.

The need for officers to maintain broad discretion in ascertaining and responding to threats to the public safety is particularly salient in encounters with mentally ill individuals, which often give rise to special exigencies. In *Fisher*, this Court recognized that officers must act swiftly in response to the unpredictable and potentially dangerous behavior of emotionally disturbed individuals. 558 U.S. at 49. The Court held that the officers were justified in responding forcibly to a disturbance call regarding a violent mentally ill man even before "ruling out innocuous explanations for ominous circumstances," because "[t]he role of a peace officer includes preventing violence and restoring order." *Id.*

(quoting *Brigham City v. Stuart*, 547 U.S. 398, 406 (2006)).

Officers also bear a duty to intervene when mentally ill individuals pose a danger to themselves. Such justification may apply even where the individual has not explicitly expressed suicidal intent. In *Fisher*, this Court noted that given the individual's violent outbursts, "it would be objectively reasonable to believe that [he] would hurt himself in the course of his rage." 558 U.S. at 48. Similarly, circuit courts of appeals have not required that officers observe clear evidence of suicidal intent before intervening. The Seventh Circuit found that "the absence of evidence of [the individual's] suicidal intent or ideation in [the officers'] presence" did not make warrantless entry unreasonable, because the officers based their belief that the individual was potentially suicidal on the dispatch call and "these observations were clearly not available to the officers at the moment of entry." *Fitzgerald v. Santoro*, 707 F.3d 725, 731 (7th Cir. 2013). Similarly, the Eleventh Circuit ruled that an officer was "acting pursuant to his official duty to protect life, and was within his authority in carrying out that duty," when he "briefly removed [an individual] from the house to speak with and observe her to ensure that she was not suicidal" even after observing that she was still alive and she requested

that he leave. *Roberts v. Spielman*, 643 F.3d 899, 904 (11th Cir. 2011).

B. An Individual's Anticipated Resistance Resulting from Mental Illness Is One of Many Factors in a Complex Split-Second Decision, and Should Be Reviewed with the Same Deference as Officer's Other Assessments.

Below, the Ninth Circuit ruled that the officers' decision "to force the second entry, without taking Sheehan's mental illness into account" was not reasonable as a matter of law. *Sheehan v. City & Cnty. of S.F.*, 743 F.3d 1211, 1225 (9th Cir. 2014). This ruling ignores qualified immunity's role in allowing officers to rely on their training and experience when making such decisions. In reaching its conclusion, the court noted that "if 'it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining the reasonableness of the force employed.'" *Id.* at 1227 (quoting *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1058 (9th Cir. 2003)). It is true that officers must consider an individual's relevant characteristics in assessing their response; however, emotional disturbance, like any other aspect of the circumstances, should be weighed by the officer in light of her training and experience and reviewed with the same deference as other

calculations made during rapidly changing encounters with violent individuals.

The Fourth, Fifth and Sixth Circuits have held that when a mentally ill or disabled individual is armed and violent, consideration of her mental capacity does not render officers' otherwise reasonable actions unreasonable. Stating that mental disability operates "[j]ust like any other relevant personal characteristic" in the Fourth Amendment calculus, the Fourth Circuit concluded that "knowledge of a person's disability simply cannot foreclose officers from protecting themselves, the disabled person, and the general public when faced with threatening conduct by the disabled individual." *Bates v. Chesterfield Cnty.*, 216 F.3d 367, 372–73 (4th Cir. 2000). Similarly, the Fifth Circuit, in finding reasonable officers' entry into the bedroom of a mentally ill man, rejected the plaintiff's suggestion "to examine the circumstances surrounding the forced entry, which may have led to the fatal shooting, in evaluating the reasonableness of the officers' use of deadly force," because he "was engaged in an armed struggle with the officers, and therefore each of the officers had a reasonable belief that [he] posed an imminent risk of serious harm to the officers." *Rockwell v. Brown*, 664 F.3d 985, 988 (5th Cir. 2011). The Sixth Circuit has held that officers must take into account individuals' diminished capacity in determining the amount of

force necessary to subdue them. *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 904 (6th Cir. 2004). However, the Sixth Circuit has declined to extend this rule to violent, armed mentally ill individuals, holding that a suspect's "diminished capacity [does] not make him any less of a serious threat to the deputies in light of" the threat he poses. *Summerland v. Cnty. of Livingston*, 240 F.App'x 70, 77 (6th Cir. 2007).

In *Saucier v. Katz*, 533 U.S. 194 (2001), this Court stated that "[i]f an officer reasonably, but mistakenly, believed that a suspect was likely to fight back the officer would be justified in using more force than in fact was needed." 533 U.S. at 205. Thus, a suspect's likely resistance is one factor in the complex calculus of an officers' discretionary decisionmaking, to which substantial deference should be afforded. Instead of providing any deference to the officers' on-the-spot decisionmaking, the Ninth Circuit's ruling effectively results in a *per se* rule that officers cannot maintain qualified immunity when entering the residence of an armed mentally ill individual over their objections, because the entry cannot be reasonable as a matter of law in light of the individual's anticipated resistance.

Such a rule would allow an individual to choose to terminate a search at any time by merely opting to object through violence rather than verbal

statements. The purpose of allowing exceptions to the warrant requirement is to allow police to intervene in emergency situations over the objections of the individual. To allow an individual to successfully thwart a lawful search through illegal conduct would contravene the purpose of the exception and undercut its application in the most critical circumstances. The exigent circumstances exception is most frequently applicable, and necessary, in those cases where an individual in the home is armed and violent—the very cases to which the Ninth Circuit rule would prevent officers from responding.

Secondly, the Ninth Circuit's rule would expose officers to second-guessing that would hamper their ability to protect the public from real threats. The fact that Sheehan's door was temporarily closed did not terminate the public safety threat she posed. Had the officers chosen not to intervene, Ms. Sheehan could have continued to pose danger to her social worker, other residents, or any member of the public who approached her dwelling, and the officers reasonably believed that she might be able to escape through her window.

The decision not to intervene in such a circumstance may itself give rise to potential tort liability, as well as intense public criticism for failure to respond to a known risk. For example, when the

public learned that police had received a safety complaint about Aurora theater shooter James Holmes one month prior to the shooting, many were outraged. *See, e.g.*, *Questions Mount over Actions of School Psychiatrist, Officer; Missed Warnings Anger Victims' Kin in Theater Rampage*, BALT. SUN, April 6, 2013, at 12A. To require officers to guess the outcome in advance and hope to be on the right side of uncertain facts in a dangerous situation involving an armed individual is the exact gamble that qualified immunity was intended to circumvent. As the Court observed in *Fisher*, "[i]t does not meet the needs of law enforcement or the demands of public safety to require officers to walk away from a situation" in which a violent mentally ill individual poses a threat to all those she might encounter. 558 U.S. at 49.

C. The Officers' Second Entry into Ms. Sheehan's Residence Was Not Unreasonable, Because Ms. Sheehan's Behavior Supported a Reasonable Belief That Violence Was Imminent.

In finding the officers' second entry unreasonable as a matter of law, the Ninth Circuit determined that the decision to breach the door was "a decision to cause a violent—and potentially deadly—confrontation with a mentally ill person without a countervailing need." It thus treated the second

entry as an independent encounter in which the officers provoked contact with Ms. Sheehan. While some circuits have found that a use of force immediately following a reasonable use of force may be unreasonable, they have found the second use of force unreasonable only when the suspect no longer poses a public safety threat, which was not the situation here. Furthermore, this Court has never applied such an analysis to the case of an armed individual actively threatening the officers or bystanders.

The deference afforded to officers in excessive force cases is especially clear when the suspect possesses a weapon or has harmed another individual. As this Court has pointed out, "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm," deadly force is authorized. *Tennessee v. Garner*, 471 U.S. 1, 11–12 (1985). When a suspect is endangering the lives of others, officers are not obligated to select the "safe" option of inaction over an action that is potentially deadly to the suspect, but certain to end the danger to bystanders. *See Scott v. Harris*, 550 U.S. 372, 385 (2007) ("We think the police need not have taken that chance [that the suspect would have stopped driving recklessly if the pursuit ended] and hoped for the best.").

Ms. Sheehan's behavior falls squarely within the public safety risks that renders officers' use of force reasonable under this Court's jurisprudence. In *Ryburn*, the Court found that a mother's suspicious behavior after "refusing to answer a question about guns" was sufficient to create "an objectively reasonable basis for fearing that violence was imminent," although the officers had not confirmed the presence of a weapon and no one in the house had made threats during the encounter. 132 S.Ct. at 992. As in *Ryburn*, Ms. Sheehan's actions gave rise to an objectively reasonable basis for the officers to believe that violence was imminent. The officers knew that Ms. Sheehan had not taken her medication, had been acting strangely and had not eaten or slept, and had threatened her social worker, who determined that she needed to be involuntarily committed. *Sheehan*, 743 F.3d 1215–16. More importantly, in contrast to *Ryburn*, at the time the officers decided to breach Ms. Sheehan's door, she had assaulted the officers and threatened to kill them, and they had confirmed the presence of a weapon in the residence. *Id.*

The officers' decision to reenter Ms. Sheehan's residence is not analogous to those cases in which courts have determined that renewed force was unreasonable because the suspect did not continue to pose a threat to the officers or the public. In *Waterman v. Batton*, the Fourth Circuit analyzed

officers' shots into a moving car while the car accelerated toward them separately from shots fired after the vehicle passed, because only before the car had passed could the officers "have interpreted the acceleration in the face of their show of force as [an attempt] to avoid capture by using his vehicle as a weapon." 393 F.3d 471, 479 (4th Cir. 2005). Similarly, in *Lamont v. New Jersey*, the Third Circuit held that officers were reasonable in opening fire as the suspect "yanked his right hand out of his waistband," because "[a]t that point, the troopers reasonably believed that [he] was pulling a gun on them." 637 F.3d 177, 184 (3d Cir. 2011). The court held that just moments later, continued fire was not reasonable, because the suspect's "weaponless right hand was fully visible." *Id.* In contrast, the officers here knew that Ms. Sheehan was armed and was still capable of effectuating assault, despite the fact that the door was closed at the moment.

The Fifth Circuit recently resolved a more analogous case involving police response to a disturbance call about a violent, schizophrenic, potentially suicidal individual. In that case, in assessing the reasonableness of the officers' decision to breach the door, the court noted that the individual, much like Ms. Sheehan, "was armed with two eight-inch knives; the officers knew that he suffered from mental-health problems, had previously exhibited violent behavior, and was

pounding on the walls of his room and yelling obscenities at the officers; and when he was shot, [he] was not fleeing from the officers, but running toward them." *Rockwell*, 664 F.3d at 988. In determining that the individual's misdemeanor assault by threat was sufficient to justify the officers' entry, the court observed that "the Supreme Court [has never] held that all of the *Graham* factors must be present for an officer's actions to be reasonable; indeed, in the typical case, it is sufficient that the officer reasonably believed that the suspect posed a threat to the safety of the officer or others." *Id.*

This Court has declined to find a subsequent use of force unreasonable where a suspect presents an active and continuing public safety threat. In *Plumhoff v. Rickard*, the Court held that officers' use of deadly force was reasonable when the suspect's "outrageously reckless driving posed a grave public safety risk," despite the fact that the car had temporarily come to a stop, because "a reasonable police officer could have concluded that [he] was intent on resuming his flight and that, if he was allowed to do so, he would once again pose a deadly threat for others on the road." 134 S.Ct. 2012, 2021–22 (2014). Similarly, Officers Holder and Reynolds reasonably concluded that Ms. Sheehan remained a threat to herself, them, and the public, even though the door to her room was temporarily closed. She

remained emotionally agitated, threatening, and armed with a knife; furthermore, she could have exited her room, either through the door in order to confront the officers or, as the officers reasonably believed, through a potential fire escape. Joint App'x at 117 (quoting the deposition of Ms. Sheehan's social worker: "[T]here probably [is] a fire escape, but I don't know for sure"). As in *Plumhoff*, a reasonable officer could have concluded that had Ms. Sheehan been left alone, she would "once again pose a deadly threat for others." 132 S.Ct. at 2022.

Here, Officers Reynolds and Holder relied on their training and experience in determining that Ms. Sheehan continued to present an acute safety threat, based on the fact that she was armed and had assaulted them. Deference to such judgments is crucial for enabling officers to act based on the information available to them in the moment, without fear of liability constraining their willingness to make difficult decisions, including the use of potentially deadly force. Just as importantly, a fair reading of the Ninth Circuit's rule would require police to lay siege on dwellings where they find a dangerous, mentally disabled person, but without a concomitant rule telling them to lift that siege if the person does not voluntarily submit to arrest.

III. APPLICATION OF THE ADA IN THE CONTEXT OF ARRESTS OF VIOLENT, ARMED INDIVIDUALS UNDULY RESTRICTS THE ESTABLISHED DISCRETION OF POLICE OFFICERS.

Application of the ADA to law enforcement agencies at the policy and training level, but not to the situation-specific decisions of individual officers, provides for accommodations tailored to an agency's practices and resources while preserving the discretion of individual officers facing public safety risks. This discretion is consistent with the principles undergirding municipal liability and provides the type of considered accommodation required by the ADA. An individual officer's failure, in the moment, to comply with training or policies provided by the department may be evidence of the inadequacy of the officer's training, but consistent with the ADA's focus on entity-level decisionmaking, it should not be an independent basis for liability when the applicable training and policies reasonably accommodate the needs of individuals with disabilities.

Even when an officer is trained properly, entity-developed policies and procedures are not guaranteed to be successful in a dangerous, unpredictable, rapidly changing situation. Municipalities provide accommodations by

successfully developing and implementing mental health crisis response programs, but the nature of these programs is largely dependent on other locally available resources beyond a law enforcement agency's control. Entity-wide accommodations may be adopted in the form of policies tailored to provide all field officers strategies to respond to mentally ill individuals' behavior; however, these policies are most successful when deployed to ensure that an encounter with a mentally ill individual does not *become* violent. No protocol can infallibly calm a hostile, aggressive individual who has already threatened violence.

While application of the ADA in the law enforcement context is appropriate at the policy and training level, it should not extend to individual officers' decisions in confrontations with a violent, armed mentally ill individual. Application of the ADA to the arrest context would strip officers of the discretion afforded them under this Court's Fourth Amendment jurisprudence.

A. Successful Mental Health Crisis Intervention Models Rely Heavily on the Availability of Local Resources and May Not Resolve Every Situation Individual Officers Must Face.

Law enforcement agencies have been sensitive to the needs of individuals with mental illness by

providing training of officers and collaboration with mental health providers, in large part because it enhances the safety of their officers and the public. As the respondent conceded, San Francisco had a crisis intervention program in place and properly trained its officers. *See Sheehan*, 743 F.3d at 1216-17.

The successful implementation of mental health crisis intervention models, however, rests on more than just training programs for officers. The success of mental health interventions is limited by both the community resources required for the infrastructure of a full-scale intervention program and the upredictable, high-risk situations officers face in the field, some of which defy even the solutions offered by extensive, high-quality training.

A successful program requires crisis response sites equipped to respond to psychiatric, substance abuse, and medical emergencies; police must also secure no refusal policies and streamlined emergency intake. Henry J. Steadman et al., *A Specialized Crisis Response Site as a Core Element of Police-Based Diversion Programs*, 52(2) PSYCHIATRIC SERVS. 219 (2001). Developing the infrastructure of a full-scale intervention program is simply infeasible for rural communities, where mental health facilities are remote, officers respond to calls alone, and backup may be dozens of miles away.

Therefore, even if a municipality has instituted an appropriate training program, individual officers responding to calls in rural or disadvantaged communities with scant mental health resources may be unable to fully implement their training. A study of the Chicago Crisis Intervention Team ("CIT") program found that CIT officers in districts with dense mental health facilities resolved more encounters through referrals or without taking action than non-CIT officers, while CIT officers responding to calls in low-resource districts resolved disputes in the same manner as non-CIT officers. Amy C. Watson et al., *CIT in Context: The Impact of Mental Health Resource Availability and District Saturation on Call Dispositions*, 34(4) INT'L J. L. PSYCHIATRY 287 (2011).

Furthermore, even the best training cannot ensure a perfect resolution to every situation officers must face. While CIT training is often successful in preventing the escalation of an encounter from non-violent to violent, officers must also respond to situations in which a mentally ill individual has already exhibited violent behavior. Research on officers' perceptions of the effectiveness of physical and non-physical force in response to vignettes of encounters with increasingly agitated individuals suggests that while "CIT training may slow the advance toward forceful measures," the suspect's use of force remained "the most salient predictor of the

officer's use of force." Michael Compton et al., *Use of Force Preferences and Perceived Effectiveness of Actions Among Crisis Intervention Team (CIT) Police Officers and Non-CIT Officers in An Escalating Psychiatric Crisis Involving a Subject with Schizophrenia*, 37(4) SCHIZOPHRENIA BULL. 737 (2011).

In light of the disparities between the resources available in various localities, determination of what the appropriate mental health crisis intervention model might be is both complicated and dependent on multiple factors. An ADA analysis at the policy and training level would support the assessment of the program selected by the agency in light of the overall resources available to the agency, and under *Olmstead*, offer the agency discretion as to its policies in implementing that program. However, imposing ADA analysis on the moment of arrest would both ignore the contextual factors that shape outcomes of mental health crisis intervention and place the burden of achieving the benefits of a community-wide program on a single officer's decisions based on incomplete information and made under exigent circumstances.

B. Application of the ADA in the Arrest Context Is Inconsistent with the Discretion Traditionally Afforded Law Enforcement Officers.

Even the most sophisticated training and mental health partnership model cannot eradicate dangerous confrontations with mentally ill individuals, and in those situations, once officers have been properly trained, the policies underlying the broad discretion this Court has given law enforcement officers in the arrest context still apply. An analysis of officers' actions on the street, as opposed to at the policy and training level, would hold officers to impossible standards in emergency situations, in contradiction to the discretion afforded them under the Court's Fourth Amendment jurisprudence.

The volatile circumstances surrounding the arrest of a violent, armed individual defy the elements of ADA analysis, standing in sharp contrast to cases involving law enforcement encounters that courts have found require accommodations under the ADA. For example, courts have applied the ADA to the detainment and interrogation of individuals with hearing impairments to require predictable, standardized accommodations, such as the use of a qualified interpreter or an assistive communication device. *See, e.g., Bahl v. Cnty. of Ramsey*, 695 F.3d

778 (8th Cir. 2012). The requirement for a sign interpreter, however, is distinct from providing a "comfort zone" to mentally ill individuals who pose a threat to public safety, because the accommodations that will resolve an accessibility problem for a hearing-impaired individual are predictable and implementable by the law enforcement agency as an entity.

Contrastingly, when an officer faces an encounter with a violent, armed mentally ill individual, it is often unclear, even in hindsight, which accommodations would have been successful. In January 2014, the International Association of Chiefs of Police ("IACP") developed and released a model policy designed to equip officers to "make difficult judgments about the mental state and intent of the individual [and] use special police skills, techniques, and abilities to effectively and appropriately resolve the situation." Int'l Ass'n of Chiefs of Police Nat'l Law Enf't Pol'y Ctr., *Responding to Persons Affected by Mental Illness or in Crisis* (Jan. 2014), at 1. The IACP model policy warns officers that they "should be prepared at all times for a rapid change in behavior." *Id.* at 2. The policy reminds officers that they "are not expected to diagnose mental or emotional conditions, but rather to recognize behaviors that are indicative of persons affected by mental illness or in crisis, with special

emphasis on those that suggest potential violence and/or danger." *Id.*

Policies like IACP's model ensure that officers are trained to enact de-escalation tactics and provide a "comfort zone" only when it is safe to do so, thus preserving their discretion to respond to public safety threats. The considerations that IACP included in its policy reflect the type of accommodations provided to mentally ill suspects through mental health crisis response programs nationwide. The IACP model policy contains a full array of procedures for identifying and responding to mentally ill individuals, including behavioral indicators of emotional disturbance and potential danger to self and others. Throughout its recommendations, the policy instructs officers to avail themselves of entity-wide resources designed to provide accommodations for individuals with mental illness: specifically, to request a backup officer in order to implement best practices for approaching and dealing with mentally ill persons, call for officers with specialized training in dealing with mental illness or crisis situations, and summon an immediate supervisor or officer-in-charge prior to taking custody of a potentially dangerous individual.

While the specific tactics recommended by an entity-wide policy are valuable for increasing the expertise and responsiveness of officers in the field,

officers must retain the discretion to apply these tactics in the "tense, uncertain, and rapidly evolving" situations in which officers have traditionally been afforded discretion in the civil rights arena. *Graham*, 490 U.S. at 397. Officers must rely on their training and the individual's objective behavior to assess an individual's risk of harm to themselves or the public based on factors such as statements made by the individual, the amount of self-control displayed by the individual, and the volatility of the environment. *Id.* Moreover, the risk of harm constantly changes: the IACP model policy recommends that "[a]ssessment of the individual and the situation must be ongoing throughout the contact beginning with the receipt of basic information about the individual and continuing until the contact is over." *Responding to Persons Affected by Mental Illness or in Crisis,* at 4.

It is in the context of confrontations with people with mental illness that the need for discretion in handling the situation is at its height. If officers are forced to make complex legal calculations assessing the reasonableness of each individual accommodation based on a multitude of factors, rather than simply relying on their training, hesitation and doubt will lead to more officer, civilian, and aggressor injuries and fatalities.

The question of whether a law enforcement agency has properly accommodated mentally ill individuals who pose a public safety risk should be analyzed with respect to the department's policies and training only. The broad discretion afforded to individual law enforcement officers under § 1983 in arrest settings should remain in place with respect to arrests of violent, armed mentally ill individuals

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

SARAH M. SHALF
Counsel of Record
EMORY LAW SCHOOL
SUPREME COURT
ADVOCACY PROJECT
1301 Clifton Road
Atlanta, GA 30322
(404) 712-4652
sarah.shalf@emory.edu

CHARLES W.
THOMPSON, JR.
Executive Director,
General Counsel
INTERNATIONAL
MUNICIPAL LAWYERS
ASSOCIATION, INC.
7910 Woodmont Ave.,
Suite 1440
Bethesda, MD 20814
(202) 466-5424

January 16, 2015

AMICUS CURIAE BRIEF

No. 13-1412

Supreme Court, U.S.
FILED
JAN 16 2015
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CITY AND COUNTY OF
SAN FRANCISCO, CALIFORNIA, *et al.*,

Petitioners,

v.

TERESA SHEEHAN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS, AND ASSOCIATION OF WASHINGTON CITIES IN SUPPORT OF PETITIONERS

COUNTY OF SANTA CLARA OFFICE OF THE COUNTY COUNSEL
ORRY KORB, County Counsel
DANNY CHOU, Assistant County Counsel
Counsel of Record
GRETA S. HANSEN, Lead Deputy County Counsel
MELISSA R. KINIYALOCTS, Deputy County Counsel
70 West Hedding Street, East Wing, 9th Floor
San Jose, California 95110
Telephone: (408) 299-5900
danny.chou@cco.sccgov.org

VANCOUVER CITY ATTORNEY'S OFFICE
DANIEL G. LLOYD
Assistant City Attorney
P.O. Box 1995
Vancouver, Washington 98668
Telephone: (360) 487-8500
dan.lloyd@cityofvancouver.us

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

	Page
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	3
BACKGROUND	6
I. POLICE ENCOUNTERS WITH MENTALLY ILL PERSONS ARE INCREASING	6
A. The Number Of Persons Suffering From An Untreated Mental Illness Has Steadily Grown	7
B. Since The 1960s, The Number Of Mentally Ill Persons Living In The Community Has Grown Dramatically Even Though Resources For Mental Health Services Have Not	8
II. LOCAL POLICE HAVE BECOME THE DE FACTO FIRST RESPONDERS FOR INCIDENTS INVOLVING THE MENTALLY ILL	10
III. KNOWLEDGE OF A SUSPECT'S MENTAL ILLNESS DOES NOT GIVE POLICE OFFICERS THE ABILITY TO PREDICT WITH ANY DEGREE OF CERTAINTY WHETHER THE SUSPECT WILL ACT VIOLENTLY IN AN EMERGENCY SETTING	14

TABLE OF CONTENTS – Continued

Page

IV. ALTHOUGH LOCAL LAW ENFORCEMENT AGENCIES ARE DEVELOPING SPECIALIZED PROGRAMS FOR DEALING WITH THE MENTALLY ILL, THE IMPACT OF THESE PROGRAMS ON THE RATE AND SEVERITY OF INJURY IS UNCLEAR 16

V. WIDELY DIFFERING LOCAL LAW ENFORCEMENT RESOURCES AND NEEDS PRECLUDE A STANDARDIZED, ONE-SIZE-FITS-ALL APPROACH TO DEALING WITH THE MENTALLY ILL 19

ARGUMENT 21

I. HOLDING POLICE AGENCIES OR OFFICERS LIABLE BECAUSE THEY FAILED TO ACCOMMODATE THE MENTAL DISABILITY OF AN ARMED SUSPECT IN AN EMERGENCY SITUATION VIOLATES FUNDAMENTAL PRINCIPLES UNDERLYING THE ADA AND QUALIFIED IMMUNITY 21

A. It Is Unreasonable To Require Police Officers To Accommodate The Mental Illness Of An Armed Suspect In An Emergency Situation 21

B. Because The Officers Could Not Predict Whether Sheehan Would Harm Herself Or Others If They Did Not Enter Her Room, They Are Entitled To Qualified Immunity 23

TABLE OF CONTENTS – Continued

Page

II. HOLDING POLICE OFFICERS AND AGENCIES LIABLE WHERE THE USE OF FORCE WAS REASONABLE PUTS OFFICERS, SUSPECTS, AND THE PUBLIC AT RISK 25

III. HOLDING POLICE OFFICERS AND AGENCIES LIABLE FOR THE USE OF REASONABLE FORCE WILL STIFLE INNOVATIVE APPROACHES TO DEALING WITH THE MENTALLY ILL AND DEPRIVE LOCAL GOVERNMENTS OF MUCH-NEEDED RESOURCES 27

IV. ASKING POLICE OFFICERS TO EXERCISE BETTER JUDGMENT IN CONFRONTING MENTALLY ILL PERSONS THAN MENTAL HEALTH PROFESSIONALS IS GROSSLY UNFAIR 31

V. EXISTING FOURTH AMENDMENT LIMITS ON THE USE OF FORCE SUFFICIENTLY PROTECT MENTALLY ILL SUSPECTS FROM INJURY DURING POLICE ENCOUNTERS 33

CONCLUSION 34

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Creighton, 483 U.S. 635 (1987) 24

Ashcroft v. al-Kidd, 131 S. Ct. 2074 (2011).....24

Butz v. Economou, 438 U.S. 478 (1978) 24

De Boise v. Taser Intern., Inc., 760 F.3d 892 (8th Cir. 2014) 23

Fisher v. City of San Jose, 558 F.3d 1069 (9th Cir. 2009) 33

Graham v. Connor, 490 U.S. 386 (1989).....25, 33

Hainze v. Richards, 207 F.3d 795 (5th Cir. 2000), *cert. denied*, 531 U.S. 959 (2000).....23

Malley v. Briggs, 475 U.S. 335 (1986).....24

Plumhoff v. Rickard, 134 S. Ct. 2012 (2014) 33

Ryburn v. Huff, 132 S. Ct. 987 (2012).....25, 26

Scott v. Henrich, 39 F.3d 912 (9th Cir. 1994).....34

Sheehan v. City and County of San Francisco, 743 F.3d 1211 (9th Cir. 2014).....22, 28

Stanton v. Sims, 134 S. Ct. 3 (2013) 24, 25

State v. Allery, 682 P.2d 312 (Wash. 1984).....33

Tucker v. Tennessee, 539 F.3d 526 (6th Cir. 2008), *cert. denied*, 558 U.S. 816 (2009).....23

Wilson v. Layne, 526 U.S. 603 (1999).....24

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION, STATUTES, AND REGULATIONS

U.S. Const. Amend. IV 28, 33, 34

42 U.S.C. § 1983 .....4, 25, 26

Community Mental Health Centers Construction Act, Pub. L. No. 88-164, 77 Stat. 282xi.....8

Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131 et seq. .....*passim*

Ala. Code § 22-52-91 (1975).....11

Alaska Stat. § 47.30.705 (1984) 11

Ariz. Rev. Stat. § 36-525 (1989).....11

Ark. Code Ann. § 20-47-210 (1989) 11

Cal. Penal Code § 835a (2014) 11, 33

Cal. Welf. & Inst. Code § 5150 (2014).....11

Colo. Rev. Stat. § 27-65-105 (2011) 11

Conn. Gen. Stat. § 17a-503 (2010) 11

Del. Code Ann. tit. 16, § 5004 (2014) 11

Fla. Stat. § 394.463 (2006) 11

Ga. Code Ann. § 37-3-41 (1994).....11

Haw. Rev. Stat. § 334-59 (2013) 11

Idaho Code § 66-326 (2013).....11

405 Ill. Comp. Stat. 5/3-606 (2010) 11

Ind. Code Ann. § 12-26-4-1 (2013).....11

Iowa Code Ann. § 229.22 (2013).....11

TABLE OF AUTHORITIES – Continued

Page

Kan. Stat. Ann. § 59-2953 (1998) 11
Ky. Rev. Stat. Ann. § 202A.041 (1982) 11
La. Rev. Stat. Ann. § 28:53 (2012) 11
Me. Rev. Stat. tit. 34, § 3862 (2010) 11
Md. Code Ann., Health-Gen. § 10-624 (2010) 11
Mass. Gen. Laws Ann. ch. 123 § 12 (2010) 11
Mich. Comp. Laws Ann. § 330.1427 (1995) 11
Minn. Stat. Ann. § 253B.05 (2010) 11
Miss. Code Ann. § 41-21-67 (2014) 11
Mo. Ann. Stat. § 632.300 (1996) 11
Mont. Code Ann. § 53-21-129 (2013) 11
Neb. Rev. Stat. Ann. § 71-919 (2007) 11
Nev. Rev. Stat. Ann. § 433A.160 (2007) 11
N.H. Rev. Stat. Ann. § 135-C:29 (2014) 11
N.J. Stat. Ann. § 30:4-27.6 (2009) 11
N.M. Stat. Ann. § 43-1-10 (2013) 11
N.Y. Mental Hyg. Law § 9.41 (1989) 11
N.C. Gen. Stat. Ann. § 122C-262 (1997) 11
N.D. Cent. Code Ann. § 25-03.1-25 (2013) 11
Ohio Rev. Code Ann. § 5122.10 (2013) 11
Okla. Stat. Ann. tit. 43A, § 5-207 (2012) 11
Or. Rev. Stat. Ann. § 426.228 (2013) 11
50 Pa. Cons. Stat. Ann. § 4405 (1966) 11

TABLE OF AUTHORITIES – Continued

Page

R.I. Gen. Laws Ann. § 40.1-5-7 (1987) 11

S.C. Code Ann. §§ 44-178-410, 44-178-430, 44-178-440 (1994) 11

S.D. Codified Laws § 27A-10-3 (1991) 11

Tenn. Code Ann. § 33-6-402 (2000) 11

Tex. Health & Safety Code Ann. § 573.001 (2013) 11

Utah Code Ann. § 62A-15-629 (1953) 11

Vt. Stat. Ann. tit. 18, § 7505 (1977) 12

Va. Code Ann. § 37.1-67.01 (2013) 12

Wash. Rev. Code § 71.05.153 (2011) 12

W. Va. Code Ann. § 9-6-5 (1984) 12

Wis. Stat. Ann. § 51.20 (1987) 12

Wyo. Stat. Ann. § 25-10-109 (2013) 12

28 C.F.R.
§ 35.104 23
§ 35.139(a) 23

MISCELLANEOUS

J. Pete Blair et al., *Reasonableness and Reaction Time*, 14 Police Q. 323 (2011) 26, 29, 32

Tim A. Bruckner et al., *Involuntary Civil Commitments After the Implementation of California's Mental Health Services Act*, 61 Psychiatric Services 1006 (2010) 12

TABLE OF AUTHORITIES – Continued

Page

Michael T. Compton et al., *A Comprehensive Review of Extant Research on Crisis Intervention Team (CIT) Programs*, 36 J. Am. Acad. Psychiatry & L. 47 (2008) 16, 17

Michael T. Compton et al., *The Police-Based Crisis Intervention Team (CIT) Model: II. Effects on Level of Force and Resolution, Referral, and Arrest*, 65 Psychiatric Services 523 (2014) 10, 16, 18, 31

Gary Cordner, *People with Mental Illness, in Problem Oriented Guides for Police Problem-Specific Guides Series* (U.S. Dep't of Justice, Office of Community Oriented Policing Services, Ser. No. 40, 2006) ..... *passim*

David L. Faigman et al., *Modern Scientific Evidence: The Law and Science of Expert Testimony, in Social & Behavioral Science* 141 (2013-2014 ed.) 15

Urara Hiroeh et al., *Death by Homicide, Suicide, and Other Unnatural Causes in People with Mental Illness: A Population-Based Study*, 358 The Lancet 2110 (2001) 15

IACP National Law Enforcement Policy Center, *Responding to Persons Affected by Mental Illness or in Crisis* (2014) 9

Amy N. Kerr et al., *Police Encounters, Mental Illness and Injury: An Exploratory Investigation*, 10 J. Police Crisis Negot. 116 (2010) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Ronald C. Kessler et al., *Prevalence and Treatment of Mental Disorders, 1990 to 2003*, 352 New Engl. J. Med. 2515 (2005).....8, 9

John Monahan & Henry J. Steadman, *Extending Violence Reduction Principles to Justice-Involved Persons With Mental Illness, in Applying Social Science to Reduce Violent Offending* 245 (J. Dvoskin et al. eds., 2012).....13, 14, 17

Melissa S. Morabito et al., *Crisis Intervention Teams and People with Mental Illness: Exploring the Factors that Influence the Use of Force*, 58 Crime & Delinquency 57 (2012).....17, 18, 19

National Alliance on Mental Illness, *Mental Illness Facts and Numbers* (2013) 7, 9, 10

Melissa Reuland & Matt Schwarzfeld, *Improving Responses to People with Mental Illnesses: Strategies for Effective Law Enforcement Training* (2008) 20, 30

Melissa Reuland et al., *Law Enforcement Responses to People with Mental Illnesses: A Guide to Research-Informed Policy and Practice* (2009) .....*passim*

Peter H. Silverstone et al., *A Novel Approach to Training Police Officers to Interact with Individuals Who May Have a Psychiatric Disorder*, 41 J. Am. Acad. Psychiatry & L. 344 (2013).....*passim*

TABLE OF AUTHORITIES – Continued

Page

Jeffrey W. Swanson et al., *Mental Illness and Reduction of Gun Violence and Suicide: Bringing Epidemiologic Research to Policy*, Annals of Epidemiology (2014) ..... *passim*

E. Fuller Torrey et al., *Justifiable Homicides by Law Enforcement Officers: What is the Role of Mental Illness* (2013) 6, 10, 27

Abigail S. Tucker et al., *Law Enforcement Response to the Mentally Ill: An Evaluative Review*, 8 Brief Treatment & Crisis Intervention 236 (2008) ..... *passim*

Jennifer Wood et al., *Police Interventions with Persons Affected by Mental Illness: A Critical Review of Global Thinking and Practice* (2011) ..... *passim*

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*[1]

The National League of Cities ("NLC") is the oldest and largest organization representing municipal governments throughout the United States. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance. Working in partnership with 49 State municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents.

The U.S. Conference of Mayors ("USCM"), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The National Association of Counties ("NACo") is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The International City/County Management Association ("ICMA") is a nonprofit professional and

---

[1] No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution to this brief's preparation or submission. The parties have consented to the filing of this brief in letters filed with the Clerk of the Court.

educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The League of California Cities ("LCC") is an association of 473 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee ("Committee"), which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

The California State Association of Counties ("CSAC") is a nonprofit corporation whose membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The Washington State Association of Municipal Attorneys ("WSAMA") is a nonprofit organization of municipal attorneys in Washington State. WSAMA members represent the 281 municipalities throughout Washington as both in-house counsel and as private, outside legal counsel. The Association of Washington Cities ("AWC") is a private, nonprofit corporation that represents Washington's cities and towns before the State Legislature, the State Executive branch and regulatory agencies. Its mission is to serve its members through advocacy, education and services. Often, WSAMA and AWC members represent police officers in lawsuits challenging the force employed, which increasingly involve encounters with the mentally ill.

Together, *amici curiae* NLC, UCSM, NACo, ICMA, LCC, CSAC, WSAMA, and AWC represent thousands of police agencies that employ hundreds of thousands of law enforcement personnel who will be directly impacted by the Court's decision in this case.

SUMMARY OF ARGUMENT

In this case, the Ninth Circuit held that police agencies may be held liable under Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131 et seq. (2009), even when their officers use objectively reasonable force against a mentally ill suspect who is armed and violent. The Ninth Circuit further held that the defendant officers in this case

were not entitled to qualified immunity and could therefore be held liable under 42 U.S.C. § 1983 (1996). Both holdings ignore the practical reality faced by police officers who must routinely confront seriously mentally ill suspects who are armed and violent like Teresa Sheehan, the plaintiff in this case.

Police officers are not mental health professionals. Yet, they have become the de facto first responders to incidents involving the mentally ill as more mentally ill persons living in the community receive little or no treatment or do not comply with the treatment they do receive. Just like suspects who are not mentally ill, suspects who are mentally ill may engage in violent behavior that not only threatens the safety of officers and innocent bystanders, but also the suspects themselves.

Recognizing that encounters with mentally ill persons may require specialized responses, some local law enforcement agencies have developed new and innovative approaches for responding to mentally ill suspects. But there is no conclusive evidence that these specialized approaches reduce the rate or severity of injuries suffered during police encounters with mentally ill suspects. In fact, several studies suggest that these specialized approaches have *no* impact whatsoever on injuries or the use of force. This is not surprising. Situational factors – not the characteristics of the suspect – typically determine the outcome of a police encounter. Police officers also encounter a wide range of mental illnesses under very diverse circumstances, precluding any

one-size-fits-all approach. Finally, knowledge of a suspect's mental illness does not give officers any greater insight into whether a mentally ill suspect will act violently toward herself or others. Even psychiatrists with decades of special education, training, and experience in dealing with the mentally ill cannot predict with any reasonable degree of certainty whether an armed suspect with a serious mental illness will harm herself or others in an emergency situation.

Moreover, many law enforcement agencies, particularly those in smaller jurisdictions, lack the funds and access to mental health resources needed to implement the specialized approaches that have been developed for dealing with mentally ill suspects. These agencies may also have unique needs that may not be met by these approaches. As a result, law enforcement agencies that have adopted specialized approaches for dealing with mentally ill suspects are still the exception, rather than the norm.

Given this practical reality, it is not reasonable to expect a police officer to undertake special procedures to accommodate an armed and violent suspect's mental disability during an emergency situation. Nor can the officer be deemed plainly incompetent because he or she did not undertake those procedures. This Court should therefore hold that police agencies need not accommodate an armed and violent suspect's mental illness in an emergency situation under the ADA and that the officers in this case are entitled to qualified immunity.

A contrary holding will have serious consequences. Rather than risk liability for their use of reasonable force, police officers will likely hesitate or delay in confronting an armed and violent suspect who displays any sign of a mental illness. This not only places officers and innocent bystanders at risk of harm, it also places the suspects themselves at risk. The specter of liability will also stifle the new and innovative approaches needed to improve outcomes of police encounters with mentally ill suspects. Existing Fourth Amendment standards governing the use of force are more than sufficient to protect the rights of mentally ill suspects. Accordingly, this Court should reverse.

BACKGROUND

I. POLICE ENCOUNTERS WITH MENTALLY ILL PERSONS ARE INCREASING.

Over the past decades, the frequency of police encounters with the mentally ill has increased significantly. E. Fuller Torrey et al., *Justifiable Homicides by Law Enforcement Officers: What is the Role of Mental Illness* 4 (2013). This can been traced to the rising numbers of persons with mental disorders and the process of "deinstitutionalization" through which mentally ill persons who were formerly confined within locked institutions were released despite the limited availability of treatment services in the community. *See* Torrey et al., *supra*, at 7-8.

Jennifer Wood et al., *Police Interventions with Persons Affected by Mental Illness: A Critical Review of Global Thinking and Practice* 1 (2011) (citation omitted); Abigail S. Tucker et al., *Law Enforcement Response to the Mentally Ill: An Evaluative Review*, 8 Brief Treatment & Crisis Intervention 236, 237 (2008).

A. The Number Of Persons Suffering From An Untreated Mental Illness Has Steadily Grown.

One in 17 adults – i.e., about 13.6 million Americans – "live with a serious mental illness such as schizophrenia, major depression, or bipolar disorder." National Alliance on Mental Illness ("NAMI"), *Mental Illness Facts and Numbers* 1 (2013) (citation omitted). "[A]pproximately 6% of adults at any given time meet criteria for a serious mental illness that interferes with at least one important activity of daily living." Wood et al., *supra,* at 1 (citation omitted). And "nearly 30% of people with a mental illness also have an addiction disorder." *Id.* (citation omitted). Finally, "[a]pproximately 20 percent of state prisoners and 21 percent of local jail inmates have 'a recent history' of a mental-health condition." NAMI, *Mental Illness Facts and Numbers*, *supra*, at 1.

Despite the growing numbers of individuals with a serious mental disorder among the United States population, approximately 60 percent of adults with a mental illness "received no mental health services in the previous year." *Id.* Indeed, "most people with a

mental disorder do not receive treatment. " Ronald C. Kessler et al., *Prevalence and Treatment of Mental Disorders, 1990 to 2003*, 352 New Engl. J. Med. 2515, 2522 (2005).

B. Since The 1960s, The Number Of Mentally Ill Persons Living In The Community Has Grown Dramatically Even Though Resources For Mental Health Services Have Not.

Changes in the treatment of mental illness since the 1960s have dramatically reduced the percentage of mentally ill persons in psychiatric facilities. In 1963, Congress passed the Community Mental Health Centers Construction Act, Pub. L. No. 88-164, 77 Stat. 282, which reduced the number of mentally ill persons in mental hospitals. As a result, the number of state psychiatric beds per 100,000 persons decreased from 339 in 1955 to 17 in 2005. Melissa Reuland et al., *Law Enforcement Responses to People with Mental Illnesses: A Guide to Research-Informed Policy and Practice* 4 (2009) (citation omitted). This process of deinstitutionalization resulted in the movement of thousands of persons with a severe mental illness from hospitals into the community. *Id.* As a result, "[p]ersons with ongoing, disabling psychiatric conditions now reside in every community." Wood et al., *supra*, at 1.

Although many persons with severe mental illness were released into the community, "adequate

community-based services to pick up the slack were never provided." Gary Cordner, *People with Mental Illness*, *in Problem Oriented Guides for Police Problem-Specific Guides Series* 7 (U.S. Dep't of Justice, Office of Community Oriented Policing Services, Ser. No. 40, 2006). "To this day, resources that were supposed to accompany deinstitutionalization have never materialized," IACP National Law Enforcement Policy Center ("IACP"), *Responding to Persons Affected by Mental Illness or in Crisis* 1, 1 (2014); *see also* Cordner, *supra*, at 7, and "[s]tudies show that most treatment for mental disorders falls below the minimum standards of quality," Kessler et al., *supra*, at 2520 (citation omitted). Even in communities that devote significant public resources to treating the mentally ill, there are mentally ill persons who do not receive adequate treatment or comply with their treatment regimens. *See, e.g.*, IACP, *Responding to Persons Affected by Mental Illness or in Crisis*, *supra*, at 4 ("Many persons who suffer from mental illness fail to use medication that has been prescribed for their diagnosed mental illness.").

The scarcity of mental health services has worsened in recent years as states have drastically cut their mental health budgets. From 2009 through 2012, states cut more than $1.6 billion in mental health services. California alone cut $764.8 million in mental health services. NAMI, *State Mental Health Cuts: The Continuing Crisis* 2 (2011).

These cuts have resulted in the "loss of services for the most vulnerable residents living with serious

mental illnesses." *Id.* at 3. "[B]oth inpatient and community services for children and adults living with serious mental illness have been downsized or eliminated. In some states, entire hospitals have been closed; in others, community mental health programs have been eliminated." *Id.* Due to these drastic cuts, a rapidly growing number of persons suffering from a serious mental illness who live in the community do not receive adequate treatment. As a result, "emergency rooms, homeless shelters, and jails are struggling with the effects of people falling through the cracks due to lack of needed mental health services and supports." *Id.* at 1.

II. LOCAL POLICE HAVE BECOME THE DE FACTO FIRST RESPONDERS FOR INCIDENTS INVOLVING THE MENTALLY ILL.

The dramatic rise in the number of persons with untreated mental illnesses living in the community has transformed local police into first responders for incidents involving the mentally ill. Torrey et al., *supra*, at 4; Reuland et al., *supra*, at 3. "During patrol duties, law enforcement officers, who often take on a mental health triage role, encounter many persons with serious mental illnesses (as well as alcohol and drug problems and developmental disabilities)." Michael T. Compton et al., *The Police-Based Crisis Intervention Team (CIT) Model: II. Effects on Level of Force and Resolution, Referral, and Arrest*, 65 Psychiatric Services 523, 523 (2014) ("Compton I"). These encounters often pose a serious risk of harm to

officers, suspects, and innocent bystanders. *See* Amy N. Kerr et al., *Police Encounters, Mental Illness and Injury: An Exploratory Investigation*, 10 J. Police Crisis Negot. 116, 117 (2010). Recognizing that dangerous behavior by mentally ill persons may pose a risk of violence and often necessitates a law enforcement response, every state has adopted legislation authorizing police to take into custody mentally ill persons who are a danger to themselves or others.[2]

---

[2] *See* Ala. Code § 22-52-91 (1975); Alaska Stat. § 47.30.705 (1984); Ariz. Rev. Stat. § 36-525 (1989); Ark. Code Ann. § 20-47-210 (1989); Cal. Welf. & Inst. Code § 5150 (2014); Colo. Rev. Stat. § 27-65-105 (2011); Conn. Gen. Stat. § 17a-503 (2010); Del. Code Ann. tit. 16, § 5004 (2014); Fla. Stat. § 394.463 (2006); Ga. Code Ann. § 37-3-41 (1994); Haw. Rev. Stat. § 334-59 (2013); Idaho Code § 66-326 (2013); 405 Ill. Comp. Stat. 5/3-606 (2010); Ind. Code Ann. § 12-26-4-1 (2013); Iowa Code Ann. § 229.22 (2013); Kan. Stat. Ann. § 59-2953 (1998); Ky. Rev. Stat. Ann. § 202a.041 (1982); La. Rev. Stat. Ann. § 28:53 (2012); Me. Rev. Stat. tit. 34, § 3862 (2010); Md. Code Ann., Health-Gen. § 10-624 (2010); Mass. Gen. Laws Ann. ch. 123 § 12 (2010); Mich. Comp. Laws Ann. § 330.1427 (1995); Minn. Stat. Ann. § 253b.05 (2010); Miss. Code Ann. § 41-21-67 (2014); Mo. Ann. Stat. § 632.300 (1996); Mont. Code Ann. § 53-21-129 (2013); Neb. Rev. Stat. Ann. § 71-919 (2007); Nev. Rev. Stat. Ann. § 433a.160 (2007); N.H. Rev. Stat. Ann. § 135-C:29 (2014); N.J. Stat. Ann. § 30:4-27.6 (2009); N.M. Stat. Ann. § 43-1-10 (2013); N.Y. Mental Hyg. Law § 9.41 (1989); N.C. Gen. Stat. Ann. § 122c-262 (1997); N.D. Cent. Code Ann. § 25-03.1-25 (2013); Ohio Rev. Code Ann. § 5122.10 (2013); Oka. Stat. Ann. tit. 43a § 5-207 (2012); Or. Rev. Stat. Ann. § 426.228 (2013); 50 Pa. Cons. Stat. Ann. § 4405 (1966); R.I. Gen. Laws Ann. § 40.1-5-7 (1987); S.C. Code Ann. §§ 44-178-410, 44-178-430, 44-178-440 (1994); S.D. Codified Laws § 27a-10-3 (1991); Tenn. Code Ann. § 33-6-402 (2000); Tex. Health & Safety Code Ann. § 573.001 (2013); Utah Code Ann. § 62a-15-629

(Continued on following page)

As a result, local police officers have become the "first-line, around-the-clock, emergency responders, mediators, referral agents, counselors, youth mentors, crime prevention actors, and much more." Reuland et al., *supra*, at 3. "[C]alls to the police about crimes and disorder involving people with mental illness [have] increased," Cordner, *supra*, at 8, and "[p]olice today encounter persons with serious mental illnesses in a range of circumstances and settings – whether in a dangerous health crisis, an escalated domestic argument, a drug arrest, the scene of a minor public disturbance or a serious violent crime, in an urban encampment of the homeless, or in a hospital emergency department," Wood et al., *supra*, at 2. For example, in California, 28 counties reported more than 597,000 detentions of persons determined to be a danger to themselves, a danger to others, or gravely disabled from 2000 to 2007. Tim A. Bruckner et al., *Involuntary Civil Commitments After the Implementation of California's Mental Health Services Act*, 61 Psychiatric Services 1006, 1007-08 (2010) (analyzing California Department of Mental Health data).

In responding to calls for assistance, police must deal with many different mental illnesses – ranging from schizophrenia to major depression to bipolar

---

(1953); Vt. Stat. Ann. tit. 18 § 7505 (1977); Va. Code Ann. § 37.1-67.01 (2013); Wash. Rev. Code § 71.05.153 (2011); W. Va. Code Ann. § 9-6-5 (1984); Wis. Stat. Ann. § 51.20 (1987); Wyo. Stat. Ann. § 25-10-109 (2013).

disorder to post-traumatic stress disorders. Cordner, *supra*, at 1. "[I]t is [also] crucial to appreciate that the vast majority of people with serious mental illness who become involved in the criminal justice system have co-occurring substance abuse disorders." John Monahan & Henry J. Steadman, *Extending Violence Reduction Principles to Justice-Involved Persons With Mental Illness, in Applying Social Science to Reduce Violent Offending* 245, 248 (J. Dvoskin et al. eds., 2012); *see also* Cordner, *supra*, at 7 ("[T]he people with mental illness the police encounter are likely to have substance abuse problems."); Peter H. Silverstone et al., *A Novel Approach to Training Police Officers to Interact with Individuals Who May Have a Psychiatric Disorder*, 41 J. Am. Acad. Psychiatry & L. 344, 344 (2013) ("Individuals with various psychiatric problems, including addictions, depression, and schizophrenia, have an increased probability of coming into contact with the police."). "In combination, psychopathology and abuse of alcohol and illicit drugs markedly increase the risk of violence and other criminal behavior." Wood et al., *supra*, at 2. Thus, police regularly receive "calls for service that involve people with mental illnesses whose violent behavior is at issue." Reuland et al., *supra*, at 6 (citations omitted). Many are "at risk of harming themselves." *Id.* at 5. "Members of the media, researchers, and police practitioners have stated repeatedly that police interactions with people with mental illness are among the most dangerous calls for service to which officers must respond." Kerr et al., *supra*, at 117.

III. KNOWLEDGE OF A SUSPECT'S MENTAL ILLNESS DOES NOT GIVE POLICE OFFICERS THE ABILITY TO PREDICT WITH ANY DEGREE OF CERTAINTY WHETHER THE SUSPECT WILL ACT VIOLENTLY IN AN EMERGENCY SETTING.

"[T]he goal of synthesizing the evidence into a coherent, comprehensive explanation of violence risk in people with serious mental illnesses remains elusive." Jeffrey W. Swanson et al., *Mental Illness and Reduction of Gun Violence and Suicide: Bringing Epidemiologic Research to Policy*, Annals of Epidemiology 1, 5 (2014). Indeed, "psychiatrists' predictions of which [male] patients would be violent, *based on their clinical assessments in the emergency setting*, turned out to be only slightly more accurate than flipping a coin; and *they were no better than chance at predicting violence in female patients*." *Id.* at 6 (emphasis added). Thus, it is impossible for police officers – who are *not* mental health professionals – to predict with any reasonable degree of certainty whether a particular suspect will act violently in an emergency situation based on their knowledge of the suspect's mental illness.

This may be because the proportion of violent behavior caused by mental illness is "surprisingly small," Monahan & Steadman, *supra*, at 246, and because people with serious mental illnesses "represent highly heterogeneous clinical populations," Swanson et al., *supra*, at 5, and "often" behave violently "for the same reasons that non-mentally ill people engage

in violent behavior," *id.* at 3. Indeed, "[e]vidence from studies in criminology and developmental epidemiology has shown that risk factors for crime and violence are similar in persons with mental illness and in the general population. " *Id.* at 4.

Of course, "the large majority [of people with serious mental illnesses] are *not* violent toward others." *Id.* at 3. But they are "more likely to commit violent acts than people who are not mentally ill." *Id.*, *see also* 2 David L. Faigman et al., *Modern Scientific Evidence: The Law and Science of Expert Testimony, in Social & Behavioral Science* 141 (2013-2014 ed.). And the risk of violent behavior is far greater if the mentally ill person also suffers from a substance abuse disorder. *See* Swanson et al., *supra*, at 3, 4; Wood et al., *supra*, at 2.

"[M]any studies have [also] shown that suicide risk is substantially increased in persons with mental disorders." Swanson et al., *supra*, at 5. "Population attributable risk proportions for suicide associated with mental disorders are in the range of 47%-74%." *Id.* These "high rates of suicide in people with mental disorders extend to all diagnostic groups. " Urara Hiroeh et al., *Death by Homicide, Suicide, and Other Unnatural Causes in People with Mental Illness: A Population-Based Study*, 358 The Lancet 2110, 2112 (2001). In addition, "the availability of lethal means such as firearms" or knives is a substantial environmental factor that contributes to the risk of suicide by mentally ill persons. Swanson et al., *supra*, at 5.

IV. ALTHOUGH LOCAL LAW ENFORCEMENT AGENCIES ARE DEVELOPING SPECIALIZED PROGRAMS FOR DEALING WITH THE MENTALLY ILL, THE IMPACT OF THESE PROGRAMS ON THE RATE AND SEVERITY OF INJURY IS UNCLEAR.

To address the challenges created by persons with mental illness, some local law enforcement agencies have collaborated "with mental health providers and advocates to design specialized responses to people with mental illnesses." Reuland et al., *supra*, at 9. Two primary models have been developed.

The first, known as the Crisis Intervention Team ("CIT") model, was pioneered by the City of Memphis and "trains sworn officers to provide crisis intervention services and act as liaisons to the formal mental health system. " *Id.* "A fundamental aspect of the CIT model is a 40-hour training that provides officers with knowledge and techniques essential to identifying signs and symptoms of mental illnesses, de-escalating crisis situations, and making appropriate dispositions." Compton I, *supra*, at 524. CIT is the most popular model. Michael T. Compton et al., *A Comprehensive Review of Extant Research on Crisis Intervention Team (CIT) Programs*, 36 J. Am. Acad. Psychiatry & L. 47, 47 (2008) ("Compton II").

The second, known as the "co-responder model," "partners mental health professionals with law enforcement at the scene to provide consultation on mental-health related issues and assist individuals in accessing treatments and supports." Reuland et al.,

supra, at 9. This model may include "police-based mental health responses, in which the police department hires mental health consultants to assist with mental health crisis calls, and mental-health based specialized responses, which are typified by mobile crisis units." Compton II, *supra*, at 47.

Research indicates that these specialized law enforcement programs for responding to the mentally ill "may be an effective component in connecting individuals with mental illnesses who come to the attention of police officers with appropriate psychiatric services." *Id.* at 52. In addition to reducing the future risk of violence by those individuals, these programs achieve important "public health goals" regardless of how the treatment "relates to violence," Monahan & Steadman, *supra*, at 246, and "cost savings," Wood et al., *supra*, at 17.

But the impact of these specialized programs on the use of force and injury is "unclear." Kerr et al., *supra*, at 120. "[S]cant empirical evidence of [their] effectiveness is available," Melissa S. Morabito et al., *Crisis Intervention Teams and People with Mental Illness: Exploring the Factors that Influence the Use of Force*, 58 Crime & Delinquency 57, 58 (2012), and "no published studies have examined [their] impact on injuries," Kerr et al., *supra*, at 120 (citation omitted). In fact, "there has been very little research about the best training approaches." Silverstone et al., *supra*, at 344. Thus, "there are no currently accepted models that appear to have reproducibly positive outcomes." *Id.* at 345.

Indeed, consistent with studies suggesting that "specific training on de-escalation techniques may not decrease the number or severity of physical interactions between individuals with mental illness and health care providers," *id.* at 344, some studies suggest that "CIT training appears to have no effect on injuries in police encounters with people with mental illness," Kerr et al., *supra*, at 129; *see also* Wood et al., *supra*, at 22 (discussing Australian study finding that CIT-like program resulted in "no difference in the use of force" or "the degree to which police were injured during encounters"). Even studies suggesting that CIT training may have "an impact on officers' actions and use-of-force decisions" are, at best, inconclusive. Compton I, *supra*, at 527; *see also* Morabito et al., *supra*, at 71. For example, one study finding that CIT-trained officers were more likely to use "verbal engagement or negotiation" also found that "there was no difference in use of force between officers with CIT training and those without it." Compton I, *supra*, at 527. Another study finding that "a CIT officer is likely to respond with less force for an increasingly resistant demeanor in comparison with non-CIT officers" also presented evidence suggesting that "CIT officers are more likely to use higher levels of force." Morabito et al., *supra*, at 71. That study also concluded that "in a situation involving a physically resistant subject, *all* officers may find force necessary to control the situation and maintain safety of all involved." *Id.* (emphasis added).

The lack of evidence that CIT training reduces the risk or severity of injury is consistent with the fact that the rate of injury in police encounters with people with mental illnesses "is similar to their rate of occurrence in police encounters with members of the general population." Kerr et al., *supra*, at 129. "[T]he type of injuries [experienced in police encounters with mentally ill persons also] mirror those experienced in the general population." *Id.* Indeed, "the criminal justice literature overwhelmingly suggests that *situational factors* are the most predictive of the outcomes of these encounters *rather than characteristics of the individual*." *Id.* at 119 (citation omitted) (emphasis added); *see also* Morabito et al., *supra*, at 60. These situational factors include "demeanor, hostility, [] impairment," and "the type of and seriousness of the crime." Morabito et al., *supra*, at 60 (citations omitted). Thus, specialized programs designed to improve police encounters with the mentally ill – which may be beneficial for other reasons – may not reduce the risk or severity of injury.

V. WIDELY DIFFERING LOCAL LAW ENFORCEMENT RESOURCES AND NEEDS PRECLUDE A STANDARDIZED, ONE-SIZE-FITS-ALL APPROACH TO DEALING WITH THE MENTALLY ILL.

Although more and more local law enforcement agencies are creating specialized programs for dealing with persons with mental illnesses, Reuland et al., *supra*, at 9; Tucker et al., *supra*, at 245, they are

still the exception. "Few law enforcement agencies or their training programs will have the internal capacity or expertise to teach the entire range of topics that first responders require when working with people with mental illnesses." Melissa Reuland & Matt Schwarzfeld, *Improving Responses to People with Mental Illnesses: Strategies for Effective Law Enforcement Training* 9 (2008). Moreover, many communities do not have "an adequate pool of local experts who can provide aspects of this training to officers" or "the funds to coordinate a training initiative, including expenses related to contracting with trainers." *Id.*

This is especially so for smaller communities where neither model may be feasible or effective. *See* Cordner, *supra*, at 26-27. Many local law enforcement agencies have limited personnel and resources. In 2004, "there were 2,202 [law enforcement] agencies with one or two full-time personnel and over 3,200 with only two to four full-time personnel." Wood et al., *supra*, at 15. And "the bulk of police organizations at state and local levels employ[ed] 99 or less full-time personnel (16,777 out of 17,876)." *Id.* at 15-16 (citation omitted). Mental health providers also may not be available in the communities that these smaller agencies serve. Cordner, *supra*, at 27; *see also* Wood et al., *supra*, at 19. Indeed, "sufficient social work/mental health resources are rarely available to provide prompt mobile response to a majority of incidents." Cordner, *supra*, at 28. Thus, "a standardized procedure or 'model' for police response to the

mentally ill is problematic." Tucker et al., *supra*, at 245. Even in communities that have adopted specialized models, "the types of training vary widely in nature, design, duration, and timing. . ." Silverstone et al., *supra*, at 344.

ARGUMENT

I. HOLDING POLICE AGENCIES OR OFFICERS LIABLE BECAUSE THEY FAILED TO ACCOMMODATE THE MENTAL DISABILITY OF AN ARMED SUSPECT IN AN EMERGENCY SITUATION VIOLATES FUNDAMENTAL PRINCIPLES UNDERLYING THE ADA AND QUALIFIED IMMUNITY.

A. It Is Unreasonable To Require Police Officers To Accommodate The Mental Illness Of An Armed Suspect In An Emergency Situation.

Application of Title II of the ADA, 42 U.S.C. §§ 12131 et seq., to police encounters with armed and violent suspects suffering from a mental illness assumes that a *reasonable* accommodation of the suspect's disability is possible in an emergency situation requiring split-second decisions. That assumption is wrong.

Any encounter with an armed suspect who suffers from a serious mental illness presents a significant risk of suicide as well as an elevated risk of violence to others. *See* Swanson et al., *supra*, at 3-5.

Yet, knowledge of the suspect's mental condition provides police officers with little or no additional insights into whether that suspect will act violently toward herself or others. *See id.* at 6. There is also no standardized approach for dealing with mentally ill suspects, Silverstone et al., *supra*, at 345, 354, and there is no conclusive evidence that any particular approach will, in fact, reduce the risk or severity of injuries, *see id.* at 345; Wood et al., *supra*, at 22; Kerr et al., *supra*, at 129.

Thus, no matter what they know about a suspect's mental condition, police officers cannot predict with any reasonable degree of certainty whether that suspect will act violently toward herself or others in an emergency situation or whether any particular approach will reduce the risk or severity of injury. As a result, there is no standard pursuant to which an officer can determine what accommodation, if any, he or she should employ in any given scenario. Exposing police agencies to ADA liability for their officers' reasonable exercise of force against an armed suspect who is mentally disabled therefore places these agencies in a no-win situation. The facts here provide a case in point. The Ninth Circuit concluded that the City and County of San Francisco could be held liable under the ADA because its officers did not "delay in entering" Sheehan's home. *Sheehan v. City and County of San Francisco*, 743 F.3d 1211, 1226 (9th Cir. 2014). But that delay could just as easily have subjected the agency to ADA (or tort) liability if Sheehan had committed suicide or harmed an

innocent bystander who may have been in her home or if she had escaped.

This is why Department of Justice regulations promulgated under the ADA do not require a public entity to permit an individual to participate in or benefit from its services, programs, or activities if the individual poses a "direct threat" to the health or safety of others. 28 C.F.R. §§ 35.139(a), 35.104 (defining "direct threat"). This is also why other circuits have held that it is *not* reasonable to expect police officers to accommodate an armed suspect's mental illness in a crisis situation that requires split-second decisions. *See De Boise v. Taser Intern., Inc.*, 760 F.3d 892, 899 (8th Cir. 2014); *Tucker v. Tennessee*, 539 F.3d 526, 536 (6th Cir. 2008), *cert. denied*, 558 U.S. 816 (2009); *Hainze v. Richards*, 207 F.3d 795, 801-02 (5th Cir. 2000), *cert. denied*, 531 U.S. 959 (2000). And this is why this Court should hold the same.

B. Because The Officers Could Not Predict Whether Sheehan Would Harm Herself Or Others If They Did Not Enter Her Room, They Are Entitled To Qualified Immunity.

For the same reasons articulated above, the officers in this case should have been accorded qualified immunity. "'Qualified immunity gives [police officers] breathing room to make reasonable but mistaken judgments,' and 'protects all but the plainly incompetent or those who knowingly violate the law.'"

Stanton v. Sims, 134 S. Ct. 3, 5 (2013) (quoting *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011)). Thus, officers "will not be [held] liable for mere mistakes in judgment, whether the mistake is one of fact or one of law." *Butz v. Economou*, 438 U.S. 478, 507 (1978). If the lawfulness of an officer's actions is debatable, immunity attaches and bars liability for damages. *al-Kidd*, 131 S. Ct. at 2083; *see also Malley v. Briggs*, 475 U.S. 335, 341 (1986) ("[I]f officers of reasonable competence could disagree on [whether the conduct was lawful], immunity should be recognized."). For "the statutory or constitutional question [to] be beyond debate," there must be controlling authority or "a robust 'consensus of cases of persuasive authority.'" *al-Kidd*, 131 S. Ct. at 2083, 2084 (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999)). And the constitutional or statutory right "must have been 'clearly established' in a more particularized, and hence more relevant, sense." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

Police officers cannot predict with any reasonable degree of certainty whether an armed suspect who is mentally ill will act violently, *see* Swanson et al., *supra*, at 6, or whether a particular approach will avoid injury, Silverstone et al., *supra*, at 345; Kerr et al., *supra*, at 129; Wood et al., *supra*, at 22. Thus, the actions of the officers in this case – which were made during a crisis situation requiring split-second judgments – cannot be deemed plainly incompetent, much less unreasonable. Under well-established precedents of this Court, these officers are entitled to qualified

immunity. *See Stanton*, 134 S. Ct. at 5; *Ryburn v. Huff*, 132 S. Ct. 987, 991-92 (2012).

II. HOLDING POLICE OFFICERS AND AGENCIES LIABLE WHERE THE USE OF FORCE WAS REASONABLE PUTS OFFICERS, SUSPECTS, AND THE PUBLIC AT RISK.

When dealing with armed and violent individuals, police officers "are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving" to protect themselves, the suspect, or innocent bystanders. *Graham v. Connor*, 490 U.S. 386, 397 (1989). In these exigent circumstances, hesitancy and delay often have serious consequences. This is true regardless of whether the suspect has a mental illness.

Exposing police officers to liability under the ADA or § 1983 for their reasonable use of force during encounters with armed and violent suspects who are mentally ill will likely induce hesitancy or delay by the officers. There are no standardized procedures for dealing with the wide spectrum of mentally ill suspects and exigent circumstances that have proven to be practical or effective in reducing injury. *See* Silverstone et al., *supra*, at 345; Tucker et al., *supra*, at 245; Cordner, *supra*, at 26-27. Nor do officers have any way of predicting the behavior of unpredictable suspects under unpredictable circumstances. *See* Swanson et al., *supra*, at 6. Left with no good options, police officers may be paralyzed into inaction.

This paralysis jeopardizes public safety. When confronted with armed and violent persons, officers often experience "perceptual and memory distortions such as tunnel vision, time dilation, and auditory blunting." J. Pete Blair et al., *Reasonableness and Reaction Time*, 14 Police Q. 323, 328 (2011). As a result, even well-trained officers often cannot react and fire their weapons before a suspect can use deadly force against the officers or innocent bystanders – even if the officer has his gun aimed at the suspect. *Id.* at 335-36. Consistent with the results of this scientific research, this Court has long held that "judges should be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation." *Ryburn*, 132 S. Ct. at 991-92. Yet, exposing the police officers or the police agency in this case to liability under § 1983 or the ADA does just that. In doing so, the Ninth Circuit's decision places the health and safety of all police officers, suspects, and bystanders at risk.

The risk of officer hesitancy or delay to the mentally ill suspect may be especially great. If the Ninth Circuit's decision is affirmed, police officers may be better off avoiding or delaying encounters with armed and violent persons with mental illnesses rather than attempting to neutralize the threat they pose. But mentally ill persons present a heightened risk of suicide, Swanson et al., *supra*, at 5, and many police encounters with the mentally ill involve threats of suicide. Delays in engaging those persons under the

auspices of offering an accommodation may increase the likelihood that they will harm themselves.

The risk of harm to police officers, mentally ill suspects, and innocent bystanders will only increase as the number of police encounters with the mentally ill continues to rise. Courts should not supplant the judgment of police officers in the field with a prescribed approach to encounters with violent, mentally ill suspects. This is especially so given the dearth of evidence that any particular approach will provide greater protection from injury to officers, suspects, or innocent bystanders. *See* Silverstone et al., *supra*, at 345; Wood et al., *supra*, at 22; Kerr et al., *supra*, at 129. To protect public safety, officers must be able to take any necessary actions, including actions that will inevitably, with 20/20 hindsight, be alleged to have further agitated the mentally ill individual.

III. HOLDING POLICE OFFICERS AND AGENCIES LIABLE FOR THE USE OF REASONABLE FORCE WILL STIFLE INNOVATIVE APPROACHES TO DEALING WITH THE MENTALLY ILL AND DEPRIVE LOCAL GOVERNMENTS OF MUCH-NEEDED RESOURCES.

Recognizing that police officers often function as "armed social workers," local law enforcement agencies have developed specialized programs that train officers to recognize the signs of mental illness and identify strategies for dealing with mentally ill persons. Torrey et al., *supra*, at 9. But current research

on these programs is limited, and "the best methods for educating the police force remain uncertain." Silverstone et al., *supra*, at 344. Indeed, "there are no currently accepted models that appear to have reproducibly positive outcomes." *Id.* at 345. Moreover, studies suggest that specialized programs may have no effect on injuries experienced during police encounters with the mentally ill. *See, e.g.*, Kerr et al., *supra*, at 129; Wood et al., *supra*, at 22.

Despite this, the Ninth Circuit held that police agencies or officers may be held liable under the ADA or Fourth Amendment for the officers' reasonable use of force when the officers fail to take "reasonable" steps to de-escalate encounters with mentally ill persons. *Sheehan,* 743 F.3d at 1216-17. Specifically, the Ninth Circuit suggested that the officers "should have respected [Sheehan's] comfort zone, engaged in non-threatening communications and used the passage of time to defuse the situation rather than precipitating a deadly confrontation." *Id.* at 1233. In doing so, the Ninth Circuit implies that this one-size-fits-all approach – developed with the benefit of 20/20 hindsight – will reduce the risk of injury during police encounters with mentally ill persons who are armed and violent.

But there are currently no evidence-based models for reducing injury during police encounters with mentally ill persons. *See* Silverstone et al., *supra*, at 345; Kerr et al., *supra*, at 129. Moreover, the diverse spectrum of mental illnesses that police encounter combined with the wide range of crisis situations that

may arise make a standardized approach ineffective and impractical. *See* Tucker et al., *supra*, at 245. As a result, exposing police officers and their government employers to liability in this case will likely result in the adoption of practices based on litigation risk, rather than empirical evidence. Those practices will likely include rigid approaches designed to avoid liability rather than reduce injury and improve outcomes.

As a result, the Ninth Circuit's decision, if affirmed, will likely discourage innovative approaches to police encounters with the mentally ill. Because the use of unproven approaches may expose law enforcement agencies to liability, these agencies will be reluctant to try new approaches for dealing with the mentally ill. Yet, new and innovative approaches are the key to improving outcomes. Indeed, "the need to design and tailor interventions suited to community contexts is essential." Wood et al., *supra*, at 36.

Even more troubling, the creation of new grounds for police liability will deprive local governments of the funds they need to develop and adopt better programs for dealing with the mentally ill. Cities and counties already "spend large sums of money to defend themselves against lawsuits when the officer is ultimately exonerated and the shooting is ruled justifiable." Blair et al., *supra*, at 325. Exposing cities and counties to liability when the use of force is reasonable will only increase the amount of money that they must devote to defending lawsuits, rather than

treating the mentally ill or improving police procedures for dealing with the mentally ill.

The harm to jurisdictions with small police forces is especially pernicious. Many lack the capacity, expertise, and funds to train their police officers and do not have access to the mental health resources needed to deal effectively with the mentally ill. Reuland & Schwarzfeld, *supra*, at 9. Moreover, many of the more accepted approaches to dealing with the mentally ill like CIT may not be suitable or effective for small jurisdictions. Cordner, *supra*, at 26-27. These jurisdictions have the greatest need for innovative approaches and for the resources needed to implement those approaches. Affirming the Ninth Circuit's decision will therefore have a disproportionate impact on the jurisdictions that can least afford it.

The proper approach to police encounters with mentally ill persons who are armed and violent should not be determined through litigation. By subjecting police officers and their municipal employers to liability when the use of force is reasonable, the Ninth Circuit's decision does just that. Accordingly, this Court should reverse.

IV. ASKING POLICE OFFICERS TO EXERCISE BETTER JUDGMENT IN CONFRONTING MENTALLY ILL PERSONS THAN MENTAL HEALTH PROFESSIONALS IS GROSSLY UNFAIR.

The primary job of police officers is to safeguard the public and keep the peace. They are not mental health professionals, and they are not trained to provide mental health treatment. Yet, police officers have been forced to play the role of social workers, psychiatrists, and psychologists. *See* Reuland et al., *supra*, at 3; Wood et al., *supra*, at 2. Forcing police officers to shoulder the burden of the limitations or shortfalls in our mental health system when injuries occur is grossly unfair.

Indeed, the successful treatment of mentally ill persons depends on many factors, including adherence to treatment regimens; effective case management; the availability of inpatient and outpatient treatment; provision of structured housing; and support from family and community members. When police officers are called to a crisis situation involving an armed and violent suspect with a mental illness, that suspect may be untreated or the suspect's treatment has failed. Police officers "commonly determine that a subject has a mental illness only when they arrive on the scene," Compton I, *supra*, at 528, and usually have limited information about the subject's mental illness and current state of deterioration, *see* Tucker et al., *supra*, at 241. Officers also often have limited options for handling the situation. *See id.* In

police encounters where injuries occur, the use of force that gave rise to the injuries may be justified based on an objective assessment of the circumstances. Blair et al., *supra*, at 325. Exposing officers to liability based on their objectively reasonable use of force in exigent circumstances places these officers in an untenable situation.

It is especially unfair to those police officers because they cannot predict with any reasonable degree of certainty whether an armed suspect with a mental illness will act violently toward herself or others in exigent circumstances. Even psychiatrists cannot make those predictions with any degree of accuracy "in an emergency setting." *See* Swanson et al., *supra*, at 6. It is also unfair because there is no conclusive evidence that any particular approach for dealing with an armed and violent person who suffers from a serious mental illness will avoid injury. *See* Silverstone et al., *supra*, at 345; Wood et al., *supra*, at 22; Kerr et al., *supra*, at 129. Holding police officers or agencies liable for the officers' use of reasonable force because the officers failed to make a prediction that trained mental health professionals could not make or because the officer failed to take an approach that no research has shown to reduce injury is not just unfair, it makes no sense.

V. EXISTING FOURTH AMENDMENT LIMITS ON THE USE OF FORCE SUFFICIENTLY PROTECT MENTALLY ILL SUSPECTS FROM INJURY DURING POLICE ENCOUNTERS.

Under the Fourth Amendment, an officer may only use any force that is reasonable. *Graham*, 490 U.S. at 396. Reasonableness "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* (citation omitted). This standard ensures that police officers may only use force that is objectively reasonable under the circumstances. When those circumstances justify deadly force, officers need not use non-deadly alternatives[3] or halt their use of deadly force until the threat is over. *See Plumhoff v. Rickard*, 134 S. Ct. 2012, 2022 (2014) ("[I]f lethal force is justified, officers are taught to keep shooting until the threat is over." (Quotation omitted)). Any other

---

[3] Officers have no duty to retreat under California law. Cal. Penal Code § 835a (peace officers need not retreat by reason of the resistance or threatened resistance of the arrestee); *accord State v. Allery*, 682 P.2d 312, 316 (Wash. 1984) (Washington law does not require retreat when "one is feloniously assaulted in a place where she has a right to be"). An en banc panel of the Ninth Circuit has also "reject[ed] th[e] premise" that "in an armed standoff, once a suspect is seized by virtue of being surrounded and ordered to surrender, the passage of time may operate to liberate that suspect, re-kindle the arrest warrant requirement, and require police to assess with each passing minute whether the circumstances remain exigent." *Fisher v. City of San Jose*, 558 F.3d 1069, 1076 (9th Cir. 2009) (en banc).

standard would require officers to exercise "super-human judgment":

> In the heat of battle with lives potentially in the balance, an officer would not be able to rely on training and common sense to decide what would best accomplish his mission. Instead, he would need to ascertain the *least* intrusive alternative (an inherently subjective determination) and choose that option and that option only. Imposing such a requirement would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves. It would also entangle the courts in endless second-guessing of police decisions made under stress and subject to the exigencies of the moment.

Scott v. Henrich, 39 F.3d 912, 915 (9th Cir. 1994).

Existing Fourth Amendment standards are already sufficient to protect the rights of mentally ill suspects who are subjected to force by police in an exigent circumstance. Neither the ADA – which only requires reasonable accommodation – nor the Fourth Amendment – which only prohibits an unreasonable search or seizure – should impose additional protections for the mentally ill.

CONCLUSION

When confronting armed and violent suspects who are mentally ill, police officers have an incredibly

difficult job. They must not only protect themselves and any innocent bystanders, they must also protect the suspects themselves. To accomplish this, officers must make split-second decisions in tense, uncertain, and rapidly changing circumstances. Because police officers cannot predict with any reasonable degree of certainty whether mentally ill suspects will act violently or whether any particular approach will reduce the risk or severity of injury, holding officers liable for their reasonable use of force is not only unfair, it also places officers, innocent bystanders, and the suspects themselves at greater risk of harm. This is not what the ADA or § 1983 requires.

Accordingly, this Court should reverse the decision of the Ninth Circuit.

Respectfully submitted,

COUNTY OF SANTA CLARA OFFICE
OF THE COUNTY COUNSEL
ORRY KORB, County Counsel
DANNY CHOU,
Assistant County Counsel
Counsel of Record
GRETA S. HANSEN,
Lead Deputy County Counsel
MELISSA R. KINIYALOCTS,
Deputy County Counsel
70 West Hedding Street,
East Wing, 9th Floor
San Jose, California 95110
Telephone: (408) 299-5900
danny.chou@cco.sccgov.org

VANCOUVER CITY
ATTORNEY'S OFFICE
DANIEL G. LLOYD
Assistant City Attorney
P.O. Box 1995
Vancouver, Washington 98668
Telephone: (360) 487-8500
dan.lloyd@cityofvancouver.us

AMICUS CURIAE BRIEF

FILED
FEB 17 2015
OFFICE OF THE CLERK

No. 13-1412

IN THE

Supreme Court of the United States

CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, *et al.*,

Petitioners,

v.

TERESA SHEEHAN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL POLICE ACCOUNTABILITY PROJECT IN SUPPORT OF RESPONDENT

JULIA SHERWIN
Counsel of Record
MICHAEL J. HADDAD
HADDAD & SHERWIN, LLP
505 Seventeenth Street
Oakland, California 94612
(510) 452-5500
haddad.sherwin@sbcglobal.net

Counsel for Amicus Curiae

258097

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF CONTENTS.... i

TABLE OF APPENDICES ii

TABLE OF CITED AUTHORITIES iii

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT..... 1

ARGUMENT..... . ..2

I. Police Are Trained in Safe Tactics for Handling the Mentally Ill. 2

II. The Fourth Amendment Requires Police to Adjust their Tactics When Dealing with Emotionally Disturbed or Mentally Ill Persons 10

CONCLUSION .... .16

TABLE OF APPENDICES

Page

APPENDIX A — PEACE OFFICER STANDARDS AND TRAINING COMMISSIONS 1a

APPENDIX B — EXCERPT OF BASIC COURSE WORKBOOK SERIES... .....7a

TABLE OF CITED AUTHORITIES

Page

CASES

Alexander v. City and County of San Francisco,
29 F.3d 1355, *cert. denied*, 513 U.S. 1084
(1995) 10, 12

Deorle v. Rutherford,
272 F.3d 1271 (9th Cir. 2001), *cert. denied*,
536 U.S. 958 (2002)..... .....11, 13

Drummond v. City of Anaheim,
343 F.3d 1052 (9th Cir. 2003), *cert. denied*,
542 U.S. 918 (2004).... ....6, 13

Graham v. Connor,
490 U.S. 386 (1989)..... ..... 10, 11, 13, 14-15

Harris v. Roderick,
126 F.3d 1189 (9th Cir. 1997), *cert. denied*,
522 U.S. 1115 (1998).... 13

Lolli v. County of Orange,
351 F.3d 410 (9th Cir. 2003)..... 10

Mattos v. Agarano,
661 F.3d 433 (9th Cir. 2011)..... ... .13

Scott v. Harris,
550 U.S. 372 (2007) 14

Cited Authorities

Page

Smith v. City of Hemet,
394 F.3d 689 (9th Cir. 2005) 11

Tennessee v. Garner,
471 U.S. 1 (1985)..... .....3, 4, 13, 15

Terry v. Ohio,
392 U.S. 1 (1968).....15

STATUTES AND OTHER AUTHORITIES

California Penal Code § 13515.25 4

Ninth Cir. Model Civil Jury Instr. 9.22 ....11, 13

Bill McConnell, Ph.D., Officer Kelly Dunn, Helynna Brooke, *San Francisco Police Department Workload Estimates Related to Providing Services to the Seriously Mentally Ill Population*, May 2010 report presented to the San Francisco Mental Health Board and San Francisco Police Department.... 3

California Commission on Peace Officer Standards and Training, September 2004 *A Report to the Legislature: The Status of Peace Officer Training on Mental Illness and Developmental Disabilities* 6, 8, 9

Supreme Court Rule 37 1

INTEREST OF THE *AMICUS CURIAE*

The National Police Accountability Project ("NPAP") is a nonprofit public interest organization dedicated to protecting the rights of individuals in their encounters with law enforcement. NPAP was founded in 1999 by members of the National Lawyers Guild. NPAP has more than five hundred attorney members throughout the United States who represent people in civil rights and police misconduct cases. NPAP provides public education and information on issues relating to police misconduct, and supports reform efforts aimed at increasing police accountability. NPAP often presents the views of victims of civil rights violations through *amicus curiae* filings in cases raising issues that transcend the interests of the parties. One of the central missions of NPAP is to promote the accountability of police officers and their employers for violations of the Constitution or laws of the United States.[1]

SUMMARY OF ARGUMENT

Respondent and other *amici* are addressing qualified immunity and the applicability of the Americans with Disabilities Act to this case, and NPAP will simply address the generally accepted law enforcement standards and clearly established law that informs both of those issues that were addressed by the Ninth Circuit. Law

---

1. Pursuant to Supreme Court Rule 37, the parties have lodged blanket consents for the filing of amicus briefs on behalf of Petitioners or Respondent. No counsel for a party authored this brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of this brief. Only *amicus curiae*, its members and its counsel, made a monetary contribution to the preparation or submission of this brief.

enforcement officers are called to respond to emotionally disturbed or mentally ill people every day. Because dealing with emotionally disturbed and mentally ill people is a significant part of their work, law enforcement officers around the country are trained in safe tactics for handling these encounters. Generally accepted law enforcement standards nationally -- grounded in the Fourth Amendment's requirement of reasonableness -- have proven effective for decades. These standards help officers resolve encounters with the mentally ill effectively and safely for the mentally ill person, the officers, and the community.

When officers violate these generally accepted standards and their training for handling contacts with emotionally disturbed or mentally ill people, it is predictable that the mentally ill person or the officer may suffer injury or death. Petitioners seek to relieve officers from their decades-long training and the Fourth Amendment's requirements of reasonableness under the totality of the circumstances. Petitioners' requested relief would endanger the mentally ill, police officers, and the public.

ARGUMENT

I. Police Are Trained in Safe Tactics for Handling the Mentally Ill.

Police officers around the country are called to respond to mentally ill people as a regular part of their jobs. Petitioners -- San Francisco police officers -- have an average of 3.5 contacts with seriously mentally ill individuals during a typical shift, and 1% of San Francisco

police officers have between 10 and 20 contacts per shift. (*San Francisco Police Department Workload Estimates Related to Providing Services to the Seriously Mentally Ill Population*, Bill McConnell, Ph.D., Officer Kelly Dunn, Helynna Brooke, May 2010 report presented to the San Francisco Mental Health Board and San Francisco Police Department, p. 2 of 19, available at http://graphics8.nytimes.com/packages/pdf/us/20101015-SFPD-Workload-Study.pdf (hereafter, "McConnell, et al.")).

At least 10% of all police time in San Francisco is spent with seriously mentally ill people. San Francisco police officers overall spend about one hour per shift -- with 35% of officers spending between one and three hours and 4% of officers spending three hours or more per shift -- with seriously mentally ill persons. (McConnell, et al., p. 2 of 19).

In *Tennessee v. Garner*, 471 U.S. 1, 10-11 (1985), where this Court struck down a Tennessee statute that allowed police officers to shoot fleeing felons, the Court looked to the policies and standards of police departments around the country. The Court noted, "The fact is that a majority of police departments in this country have forbidden the use of deadly force against nonviolent suspects. If those charged with the enforcement of the criminal law have abjured the use of deadly force in arresting nondangerous felons, there is a substantial basis for doubting that the use of such force is an essential attribute of the arrest power in all felony cases." 471 U.S. at 10-11.

This Court in *Garner* observed, "In evaluating the reasonableness of police procedures under the Fourth Amendment, we have also looked to prevailing rules in individual jurisdictions." 471 U.S. at 15-16. It then

surveyed the laws in the states, and found that 86.8% of states forbade the use of deadly force on fleeing felons. 471 U.S. at 16 – 19 and notes 14-20.

In this case, longstanding training for officers around the country provides them with the tools they need to do their jobs safely. Those tools include the ability to de-escalate situations involving mentally ill persons, and resolve those events safely for everyone involved. Every state in the country, with the exception of Hawaii, has a commission that provides standardized, generally accepted training to all law enforcement officers in that state. (Appendix A, List of national POST agencies).

The California Commission on Peace Officer Standards and Training (POST) trains all officers in the State of California, including Petitioners, in the generally accepted tactics for handling contacts with disabled and mentally ill persons. (Appendix B, California POST Learning Domain (LD) 37, Persons with Disabilities). This training begins in the police academy. *Id.* Since 2006, the California Legislature also has required California POST to develop continuing education on this important topic. California Penal Code § 13515.25.[2]

---

2. **§ 13515.25. Continuing education as to disabled and mentally ill persons:**

(a) By July 1, 2006, the Commission on Peace Officer Standards and Training shall establish and keep updated a continuing education classroom training course relating to law enforcement interaction with mentally disabled persons. The training course shall be developed by the commission in consultation with appropriate community, local, and state organizations and agencies that have expertise in the area of mental illness and developmental

California POST has found: "The number of people in need of care and treatment overwhelm California's local

---

disability, and with appropriate consumer and family advocate groups. In developing the course, the commission shall also examine existing courses certified by the commission that relate to mentally disabled persons. The commission shall make the course available to law enforcement agencies in California.

(b) The course described in subdivision (a) shall consist of classroom instruction and shall utilize interactive training methods to ensure that the training is as realistic as possible. The course shall include, at a minimum, core instruction in all of the following:

(1) The cause and nature of mental illnesses and developmental disabilities.

(2) How to identify indicators of mental disability and how to respond appropriately in a variety of common situations.

(3) Conflict resolution and de-escalation techniques for potentially dangerous situations involving mentally disabled persons.

(4) Appropriate language usage when interacting with mentally disabled persons.

(5) Alternatives to lethal force when interacting with potentially dangerous mentally disabled persons.

(6) Community and state resources available to serve mentally disabled persons and how these resources can be best utilized by law enforcement to benefit the mentally disabled community.

(7) The fact that a crime committed in whole or in part because of an actual or perceived disability of the victim is a hate crime punishable under Title 11.6 (commencing with Section 422.55) of Part 1.

mental health system, and law enforcement has become the safety net for the mentally ill. It is important that law enforcement personnel have the appropriate training to deal effectively with this population." (California Commission on Peace Officer Standards and Training, September 2004 *A Report to the Legislature: The Status of Peace Officer Training on Mental Illness and Developmental Disabilities*, p. 8, available at http://libcat.post.ca.gov/dbtw-wpd/documents/post/60382962.pdf).

Such "training materials are relevant not only to whether the force employed in [a given case] was objectively unreasonable, ... but also to whether reasonable officers would have been on notice that the force employed was objectively unreasonable." *Drummond v. City of Anaheim*, 343 F.3d 1052, 1062 (9th Cir. 2003), *cert. denied*, 542 U.S. 918 (2004).

California POST trains that during contacts with an emotionally disturbed or mentally ill person ("EDP"), the "situation can be unpredictable and escalate quickly." (Appendix B, POST Learning Domain 37, p. 4-12). Officers are instructed to **calm the situation**, by using the following tactics:

(c) The commission shall submit a report to the Legislature by October 1, 2004, that shall include all of the following:

(1) A description of the process by which the course was established, including a list of the agencies and groups that were consulted.

(2) Information on the number of law enforcement agencies that utilized, and the number of officers that attended, the course or other courses certified by the commission relating to mentally disabled persons from July 1, 2001, to July 1, 2003, inclusive.

- Request backup.
- Move slowly.
- When possible, eliminate emergency lights and sirens and disperse any crowd that may have gathered.
- Assume a quiet nonthreatening manner when approaching and conversing with the individual.
- If possible, avoid physical contact if no violence or destructive acts have taken place.
- If possible, explain intended actions before taking action.
- Take time to assess the situation.
- Provide reassurance that officers are there to help.
- Give the person time to calm down.

POST also instructs officers to **communicate with the EDP**:

- Keep sentences short.
- Talk with the individual in an attempt to determine what is bothering that person.
- Acknowledge the person's feelings.

- Ask if the person is hearing voices and, if so, what they are saying.

- Avoid topics that may agitate the person.

- Allow time for the person to consider questions and be prepared to repeat them.

(Appendix B, POST Learning Domain 37, pp. 4-12, 4-13).

Additionally, POST trains police officers, "**do not threaten the individual** with arrest **or in any other manner,**" explaining that "**threats may create additional fright, stress, or potential aggression.**" (Appendix B p. 4-13, emphasis added).

Officer Holder and Sergeant Reynolds received this standard training, and failed to follow it during the Sheehan incident.

Moreover, San Francisco has established a Police Crisis Intervention Training (P-CIT) program, to train officers over and above the State of California's minimum training. San Francisco has the highest rate of mental health commitments in the State of California, with a rate of 140 commitments per 10,000 population, compared to the statewide average of 47 per 10,000. (California Commission on Peace Officer Standards and Training, *A Report to the Legislature: The Status of Peace Officer Training on Mental Illness and Developmental Disabilities*, p. 4, September 2014, *supra*). Approximately 25% of calls for police service in San Francisco involve someone who is mentally ill. (*Id.*, p. 17).

In response to advocacy by the community and mental health workers, San Francisco established its P-CIT training program for police officers in 2001. The program is 40 hours long and includes site visits to a psychiatric ward, a residential treatment center, and outpatient services. (California Commission on Peace Officer Standards and Training, *A Report to the Legislature: The Status of Peace Officer Training on Mental Illness and Developmental Disabilities*, p. 4, September 2014, *supra*).

Between 2001 and 2004, San Francisco provided P-CIT training to 25% of its officers, with the intention to train all patrol officers as long as funding existed. (*Id.*, p. 5). "Due to the significant numbers of police emergency calls with a mental health code (approximately 459 per month) the [San Francisco Police] Department committed to having every patrol officer trained and self-sufficient to handle situations, as first responders." (California Commission on Peace Officer Standards and Training, *A Report to the Legislature: The Status of Peace Officer Training on Mental Illness and Developmental Disabilities*, p. 17, September 2014, *supra*).

San Francisco found that its P-CIT training program "has proven beneficial to the community, as well as the Police Department." (*Id.*, p. 5).

It appears that Petitioners Sergeant Reynolds and Officer Holder may not have been P-CIT trained. If they were, they ignored their training. If they were not, a jury can find that it was unreasonable for them to fail to wait for backup, or ask for a P-CIT trained officer to respond to the situation, before they aggressively and provocatively re-entered Ms. Sheehan's room and shot her.

II. The Fourth Amendment Requires Police to Adjust their Tactics When Dealing with Emotionally Disturbed or Mentally Ill Persons.

By the time of these events, the law in the relevant circuit was clearly established concerning Petitioners' uses of force under the totality of the circumstances. Under the Fourth Amendment, law enforcement officers may only use such force as is objectively reasonable under the circumstances. *Graham v. Connor*, 490 U.S. 386, 397 (1989). "[T]he reasonableness inquiry is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397.

"The essence of the *Graham* objective reasonableness analysis is that the *force* which was applied must be balanced against the *need* for that force: it is *the need for force* which is at the *heart* of the *Graham* factors." *Alexander v. City and County of San Francisco*, 29 F.3d 1355, 1367, *cert. denied*, 513 U.S. 1084 (1995). (emphasis in original, citations omitted). "Thus, where there is no need for force, *any* force used is constitutionally unreasonable." *Lolli v. County of Orange*, 351 F.3d 410, 417 & n.5 (9th Cir. 2003).

Factors to consider in evaluating the need for force include "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. "The most important single element of the three specific factors" is "whether the suspect poses an

immediate threat to the safety of the officers or others." *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005) (*en banc*).

"A simple statement by an officer that he fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern." *Deorle v. Rutherford*, 272 F.3d 1271, 1281 (9th Cir. 2001), *cert. denied*, 536 U.S. 958 (2002). Nor is "[a] desire to resolve quickly a potentially dangerous situation ... the type of governmental interest that, standing alone, justifies the use of force that may cause serious injury." *Deorle*, 272 F.3d at 1281.

Courts may also consider other factors in evaluating the need for force under the totality of the circumstances. *Graham*, 490 U.S. at 396 ("Because '[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' however, its proper application requires careful attention to the facts and circumstances of each particular case.") (citation omitted). For instance, the *en banc* Ninth Circuit has resolved that the availability of **less intrusive alternatives** should be considered when assessing the reasonableness of a particular use of force. *Smith*, 394 F.3d at 701. *See also*, Ninth Cir. Model Civil Jury Instr. 9.22.

The Ninth Circuit has repeatedly stated that a person's mental disturbance or incapacity is an important factor militating against the use of force by officers:

> The problems posed by, and thus the tactics to be employed against, an unarmed, emotionally distraught individual who is

creating a disturbance or resisting arrest are ordinarily different from those involved in law enforcement efforts to subdue an armed and dangerous criminal who has recently committed a serious offense. In the former instance, increasing the use of force may, in some circumstances at least, exacerbate the situation; in the latter, a heightened use of less-than-lethal force will usually be helpful in bringing a dangerous situation to a swift end. **In the case of mentally unbalanced persons, the use of officers and others trained in the art of counseling is ordinarily advisable, where feasible, and may provide the best means of ending a crisis.** See *Alexander*, 29 F.3d 1366 (holding that the police used excessive force, considering all the circumstances, in "storming the house of a man whom they knew to be a mentally ill ... recluse who had threatened to shoot anybody who entered"). Even when an emotionally disturbed individual is "acting out" and inviting officers to use deadly force to subdue him, the governmental interest in using such force is diminished by the fact that the officers are confronted, not with a person who has committed a serious crime against others, but with a mentally ill individual. We do not adopt a per se rule establishing two different classifications of suspects: mentally disabled persons and serious criminals. Instead, **we emphasize that where it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be**

> **considered in determining, under *Graham*, the reasonableness of the force employed.**

Deorle, 272 F.3d at 1282-1283 (emphasis added). *See also* Ninth Cir. Model Civil Jury Instr. 9.22 (*citing Drummond*, 343 F.3d at 1058) (If "it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining, under *Graham*, the reasonableness of the force employed[]").

A mere potential threat cannot justify a police officer's use of force. *Graham*, 490 U.S. at 396 ("immediate threat"); *Mattos v. Agarano*, 661 F.3d 433, 444, n.5 (9th Cir. 2011) (en banc) (explaining critical distinction between potential threat and immediate threat); *Deorle*, 272 F.3d at 1281 ("A simple statement by an officer that he fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern").

Nearly 30 years ago, this Court established that a police officer may only use deadly force where the suspect poses an "immediate" threat of death or serious bodily injury to the officer or others. *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). This Court observed in that case, "It is not better that all felony suspects die than they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." 471 U.S. at 11.

Furthermore, "[W]henever practicable, a warning must be given before deadly force is employed." *Harris v. Roderick*, 126 F.3d 1189, 1201 (9th Cir. 1997), *cert. denied*, 522 U.S. 1115 (1998), *citing Garner*, 471 U.S. at 11-12.

In determining the reasonableness of the manner in which a seizure is effected, "[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Scott v. Harris*, 550 U.S. 372, 383, 386 (2007) (citation omitted) (finding officer's ramming suspect's car, posing a "high likelihood of serious injury or death" to the suspect, was objectively reasonable, because the suspect, engaged in a dangerous high-speed car chase, posed a "substantial and immediate risk of serious physical injury to others").

Here, neither the governmental interests claimed by Petitioners, nor the actual governmental interests, justify Petitioners' unnecessary and provocative conduct creating a "high likelihood of serious injury or death" to either Respondent or Petitioners. Where Respondent was known to be a gravely disabled and severely mentally ill and paranoid woman, neither her possession of a knife, nor her earlier threats to stab officers with it if they did not leave her alone in her room, were a surprise. While Petitioners Reynolds and Holder were standing outside Respondent's room and waiting for backup, Respondent no longer posed an immediate threat. If Petitioners had followed the law and their training which comports with generally accepted law enforcement standards around the country, this situation could have been defused with what Respondent's police practices expert, Lou Reiter, aptly summarizes as "CCCT" – containment, coordination, communication and time.

This Court has explained that courts must consider when officers are forced to make "split-second" judgments about the use of force. *Graham v. Connor*, 490 U.S. at

396-397. Not every deadly force decision requires a "split-second" judgment. *Tennessee v. Garner*, 471 U.S. at 20. Moreover, this Court observed, "similarly difficult judgments must be made by police in equally uncertain circumstances. See, *e.g.*, *Terry v. Ohio*, 392 U.S. [1] at 20, 27 [(1968)]." *Id.* Here, Petitioners' decisions themselves created whatever exigency they thought they faced.

Time was on Officer Holder's and Sergeant Reynolds' side in this case. They had already called for backup, and could easily have called for a P-CIT certified officer to handle the situation. Ms. Sheehan was contained in her single-room apartment on the third floor of a building, and all indications were that she had no intention on leaving and wanted to be left alone in her room. In the absence of the officers' reckless provocation, in violation of their training and clearly established standards, this incident would not have called for any split-second judgments.

Reasonable law enforcement officers do not need to shoot their way out of dangerous situations created only by their own violation of training and clearly established standards. Petitioners created the situation where they used deadly force, and that force was avoidable and unnecessary. The new rules that Petitioners ask this Court to create – contrary to generally accepted law enforcement standards – would increase the risk of serious injury and death to officers, the disabled, and the general public.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

JULIA SHERWIN
Counsel of Record
MICHAEL J. HADDAD
HADDAD & SHERWIN, LLP
505 Seventeenth Street
Oakland, California 94612
(510) 452-5500
haddad.sherwin@sbcglobal.net

Counsel for Amicus Curiae

APPENDIX

APPENDIX A — PEACE OFFICER STANDARDS AND TRAINING COMMISSIONS

PEACE OFFICER STANDARDS AND TRAINING COMMISSIONS

Alabama: Alabama Standards & Training Commission, http://www.apostc.state.al.us

Alaska: Alaska Police Standards Council, http://www.dps.alaska.gov/APSC/

Arizona: Arizona Peace Officer Standards and Training Board, https://post.az.gov

Arkansas: Arkansas Commission on Law Enforcement Standards & Training, http://www.clest.org/Pages/default.aspx

California: California Commission on Peace Officer Standards and Training (POST), https://www.post.ca.gov

Colorado: Colorado Peace Officer Standards and Training Board http://www.coloradoattorneygeneral.gov/departments/criminal_justice/post_board

Connecticut: Department of Emergency Services & Public Protection Police Officer Standards and Training Council, http://www.ct.gov/post/site/default.asp

Delaware: Delaware Council on Police Training, http://regulations.delaware.gov/AdminCode/title1/800/801.shtml

Appendix A

Florida: Florida Criminal Justice Standards & Training Commission (CJSTC), http://www.fdle.state.fl.us/Content/getdoc/91a75023-5a74-40ef-814d-8e7e5b622d4d/CJSTC-Home-Page.aspx

Georgia: State of Georgia Peace Officer Standards and Training Council, http://www.gapost.org

Hawaii: Does not have a statewide police standards board. (See article: http://www.civilbeat.com/2013/03/18649-why-is-hawaii-the-only-state-without-a-statewide-police-standards-board/)

Idaho: Idaho Peace Officer Standards & Training, https://www.post.idaho.gov

Illinois: Illinois Law Enforcement Training & Standards Board, http://www.ptb.state.il.us

Indiana: Indiana Law Enforcement Accreditation Commission, http://iacop.org/accreditation

Iowa: Iowa Law Enforcement Training Academy, https://ileatraining.org/default.aspx/MenuItemID/239/MenuGroup/Home.htm

Kansas: Kansas Commission on Peace Officers' Standards and Training, http://www.kscpost.org

Kentucky: The Kentucky Law Enforcement Council, https://docjt.ky.gov/Organization/Training%20Support/KLEC%20POPS/klec.html

Appendix A

Louisiana: The Louisiana Commission on Law Enforcement and Administration of Criminal Justice Peace Officer Standards and Training Council (POST), http://www.lcle.la.gov/programs/post.asp

Maine: Maine Criminal Justice Academy, https://www1.maine.gov/dps/mcja/training/basiclaw/index.htm

Maryland: Maryland Police and Correctional Training Commissions (PCTC), http://www.dpscs.state.md.us/aboutdpscs/pct/

Massachusetts: Municipal Police Training Committee (MPTC), http://www.mass.gov/eopss/law-enforce-and-cj/law-enforce/mptc/

Michigan: Michigan Commission on Law Enforcement Standards, http://www.michigan.gov/mcoles

Minnesota: Minnesota Board of Peace Officer Standards and Training (POST), https://dps.mn.gov/entity/post/Pages/default.aspx

Mississippi: Mississippi Department of Public Safety Office of Standards and Training, http://www.dps.state.ms.us/divisions/public-safety-planning/office-of-standards-and-training/

Missouri: Missouri Department of Public Safety Peace Officer Standards and Training (POST) Program, http://www.dps.mo.gov/dir/programs/post/default.asp

Appendix A

Montana: Montana Public Safety Officer Standards & Training (POST), https://dojmt.gov/post/

Nebraska: Nebraska Police Standards Advisory Council, http://nletc.nebraska.gov/psac.html

Nevada: Nevada Commission on Peace Officers' Standards and Training, http://post.nv.gov

New Hampshire: New Hampshire Police Standards and Training Council, http://www.pstc.nh.gov

New Jersey: New Jersey Division of Criminal Justice Police Training Commission, http://www.state.nj.us/lps/dcj/njptc/home.htm

New Mexico: New Mexico Department of Public Safety Training and Recruiting Division, http://nmlea.dps.state.nm.us

New York: Office of Public Safety, http://www.criminaljustice.ny.gov/ops/training/

North Carolina, The North Carolina Sheriffs' Education and Training Standards and the Criminal Justice Education & Training Standards, http://www.ncdoj.gov/About-DOJ/Law-Enforcement-Training-and-Standards.aspx

North Dakota: North Dakota Peace Officer Standards and Training (P.O.S.T.), http://www.post.nd.gov

Appendix A

Ohio: Ohio Peace Officer Training Commission, http://www.ohioattorneygeneral.gov/Law-Enforcement/Ohio-Peace-Officer-Training-Academy/Ohio-Peace-Officer-Training-Commission

Oklahoma: Council on Law Enforcement Education and Training, http://www.ok.gov/cleet/

Oregon: Oregon Department of Public Safety Standards and Training (DPSST), http://www.oregon.gov/DPSST/Pages/index.aspx

Pennsylvania: Municipal Police Officers' Education & Training Commission, http://www.mpoetc.state.pa.us/portal/server.pt/community/mpoetc/7545

Rhode Island: Rhode Island Police Officers Commission on Standards and Training, http://sos.ri.gov/govdirectory/?page=DetailDeptAgency&eid=744

South Carolina: South Carolina Criminal Justice Academy, http://www.sccja.sc.gov

South Dakota: South Dakota Law Enforcement Officers Standards and Training Commission, http://dci.sd.gov/LawEnforcementTraining/StandardsandTrainingCommission.aspx

Tennessee: Tennessee Peace Officers Standards and Training (P.O.S.T.) Commission, http://www.tn.gov/let/post/

Appendix A

Texas: Texas Commission on Law Enforcement, http://www.tcole.texas.gov

Utah: Utah Peace Officer Standards and Training, http://publicsafety.utah.gov/post/contact.html

Vermont: Vermont Criminal Justice Training Council, http://vcjtc.vermont.gov

Virginia: Virginia Department of Criminal Justice Services, http://www.dcjs.virginia.gov/standardsTraining/

Washington: Washington State Criminal Justice Training Commission, https://fortress.wa.gov/cjtc/www/

West Virginia: West Virginia Law Enforcement Professional Standards (LEPS) Program, http://www.djcs.wv.gov/law-enforcement-professional-standards/Pages/default.aspx

Wisconsin: Wisconsin Department of Justice, Training and Standards Bureau, http://www.doj.state.wi.us/dles/training-and-standards-bureau

Wyoming: Wyoming Peace Officers Standards and Training Commission (POST), http://ag.wyo.gov/post-home-page

APPENDIX B — EXCERPT OF BASIC COURSE WORKBOOK SERIES

BASIC COURSE WORKBOOK SERIES
Student Materials
Learning Domain 37
Persons with Disabilities
Version Four

* * *

Field Contacts with Persons with Mental Illness

Field Contacts The following table identifies appropriate tactical actions officers should be aware of.

Action	Additional Information
Request backup	• Situation can be unpredictable and escalate quickly.
Calm the situation	• Move slowly. • When possible, eliminate emergency lights and sirens and disperse any crowd that may have gathered. • Reduce environmental distractions such as radio or television noise. • Assume a quiet nonthreatening manner when approaching and conversing with the individual.

Appendix B

	• If possible, avoid physical contact if no violence or destructive acts have taken place. • If possible, explain intended actions before taking action. • Take time to assess the situation. • Provide reassurance that officers are there to help. • Give the person time to calm down.
Communicate	• Keep sentences short. • Determine if the person is taking medication. • Talk with the individual in an attempt to determine what is bothering that person. • Acknowledge the person's feelings. • Ask if the person if he or she is hearing voices and, if so, what they are saying.

Appendix B

	• Avoid topics that may agitate the person. • Guide the conversation toward subjects that will bring the individual back to reality (*e.g.*, childhood experiences). • Allow time for the person to consider questions and be prepared to repeat them. • Do not mock the person or belittle his or her behavior (*i.e.*, delusions or hallucinations).
Do not make threats	• Do not threaten the individual with arrest or in any other manner. • Threats may create additional fright, stress, or potential aggression.
Be truthful	• If the individual becomes aware of deception, that person may: withdraw from any contact in distrust, become hypersensitive, or retaliate in anger.

* * * *

AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED
FEB 17 2015
OFFICE OF THE CLERK

No. 13-1412

In The
Supreme Court of the United States

CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA, *et al.*,

Petitioners,

v.

TERESA SHEEHAN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE POLICY COUNCIL ON LAW ENFORCEMENT AND THE MENTALLY ILL IN SUPPORT OF RESPONDENT

Anita S. Earls
Ian A. Mance
SOUTHERN COALITION FOR SOCIAL JUSTICE
1415 West NC Highway 54, Suite 101
Durham, NC 27707
(919) 323-3380
anita@scsj.org
ianmance@scsj.org

Counsel for Amicus Curiae

William Harry Ehlies, II
Counsel of Record
310 Mills Avenue, Suite 201
Greenville, SC 29605
(864) 232-3503
hank@ehlieslaw.com

Counsel for Amicus Curiae

Dated: February 17, 2015

THE LEX GROUP DC • 1825 K Street, N.W. • Suite 103 • Washington, D.C. 20006
(202) 955-0001 • (800) 856-4419 • Fax: (202) 955-0022 • www.thelexgroup.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. THE ADA MUST APPLY VIGOROUSLY TO POLICE ENCOUNTERS WITH PEOPLE WITH MENTAL ILLNESSES BECAUSE THEY ARE PARTICULARLY VULNERABLE 5

A. The ADA Is Essential To, And Was Designed With The Purpose of, Protecting Persons With Mental Illness 5

B. Both the Fourth Amendment and the ADA Rightly Require Officers to Account for the Purpose of the Interaction as Well as for Mental Illness When Effectuating Arrests or Civil Detention 7

II. THE PUBLIC NEEDS ASSURANCE THAT THE ADA WILL APPLY, AND THAT POLICE WILL NOT UNNECESSARILY ESCALATE THE SITUATION, WHEN REQUESTS ARE MADE FOR LAW ENFORCEMENT ASSISTANCE IN MAKING AN INVOLUNTARY MENTAL HEALTH COMMITMENT 10

A. Public Policy Concerns Counsel for Sustaining the ADA Accommodation Requirement's Applicability 11

B. The ADA Accommodation Requirement Should Apply Where Mentally Ill Persons Are Barricaded and Not Posing an Immediate Threat 12

C. Fairness and Equity Suggest the ADA Accommodation Requirement Should Apply When Officers are Present for the Sole Purpose of Assisting Persons Suffering from Mental Illness 13

III. EXISTING RULES ARE SUFFICIENT TO PROTECT OFFICER SAFETY, AND THE COURT SHOULD NOT MAKE IT MORE DIFFICULT FOR PERSONS WITH MENTAL ILLNESS TO MAKE A REASONABLE ACCOMMODATION CLAIM UNDER THE ADA 16

A. Existing ADA Rules, Which Require Individualized Inquiry Into the Nature of the Danger, Are Sufficient to Protect the Important Safety Interests of Police Officers Who Might Be Endangered By the Accommodation of an Armed Mentally Ill Individual 16

B. Because an Attempt at Negotiation—Not Violent Confrontation—Is the Reasonable Policy Under the Facts of This Case, the Imposition of a 'Special Circumstances' Test is Inappropriate 18

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

CASES

Bahl v. Cnty. of Ramsey,
695 F.3d 778 (8th Cir. 2012) 7

Bircoll v. Miami-Dade Cnty.,
480 F.3d 1072 (11th Cir. 2007) 7

Bragdon v. Abbott,
524 U.S. 624 (1998) 17

Buchanan v. Maine,
469 F.3d 158 (1st Cir. 2006) 8

Cady v. Dombrowski,
413 U.S. 433 (1973) 14

De Boise v. Taser Int'l, Inc.,
760 F.3d 892 (8th Cir. 2014) 9

Drummond ex rel. Drummond v. City of Anaheim,
343 F.3d 1052 (9th Cir. 2003) 7

Elizondo v. Green,
671 F.3d 506 (5th Cir. 2012) 12

Escobedo v. State of Ill.,
378 U.S. 478 (1964) 15

Estate of Mauro By & Through Mauro v. Borgess Med. Ctr.,
137 F.3d 398 (6th Cir. 1998) 17

Estate of Stevens v. City of Green Bay,
105 F.3d 1169 (7th Cir. 1997) 13, 15

Fees v. Trow,
521 A.2d 824 (N.J. 1987) 6

Gohier v. Enright,
186 F.3d 1216 (10th Cir. 1999) 8

Gorman v. Bartch,
152 F.3d 907 (8th Cir. 1998) 8

Graham v. Connor,
490 U.S. 386 (1989) 7, 9, 10

Gutierrez v. City of San Antonio,
139 F.3d 441 (5th Cir. 1998) 20

Hainze v. Richards,
207 F.3d 795 (5th Cir. 2000) 22

Hicks v. Talbott Recovery Sys., Inc.,
196 F.3d 1226 (11th Cir. 1999) 12

Kiman v. New Hampshire Dep't of Corr.,
451 F.3d 274 (1st Cir. 2006) 8

Klitzman, Klitzman & Gallagher v. Krut,
744 F.2d 955 (3d Cir. 1984) 11

Kneipp v. Tedder,
95 F.3d 1199 (3d Cir. 1996) 13

Lesley v. Hee Man Chie,
250 F.3d 47 (1st Cir. 2001) 17

Mark v. Borough of Hatboro,
51 F.3d 1137 (3d Cir. 1995) 13

McCabe v. Life-Line Ambulance Serv., Inc.,
77 F.3d 540 (1st Cir. 1996) 5

McClendon v. City of Columbia,
305 F.3d 314 (5th Cir. 2002)..... 13

Michigan Dep't of State Police v. Sitz,
496 U.S. 444 (1990)..... 15

Neal v. St. Louis Co. Bd. of Police Comm'rs,
217 F.3d 955 (8th Cir. 2000)..... 21

Olmstead v. L.C. ex rel. Zimring,
527 U.S. 581 (1999)..... 11

Perez v. Town of Cicero,
No. 06 C 4981, 2011 WL 4626034
(N.D. Ill. Sept. 30, 2011) 12-13

Roberts v. City of Omaha,
723 F.3d 966 (8th Cir. 2013)..... 8

Sch. Bd. of Nassau Cnty., Fla. v. Arline,
480 U.S. 273 (1987)..... 17

Terrell v. Larson,
396 F.3d 975 (8th Cir. 2005) 21

Ullom v. Miller,
705 S.E.2d 111 (W. Va. 2010) 13, 14

United Airways, Inc. v. Barnett,
535 U.S. 391 (2002) 19, 22

Wagner v. Hedrick,
383 S.E.2d 286 (W. Va. 1989) 14

Waller ex rel. Estate of Hunt v. Danville, VA,
556 F.3d 171 (4th Cir. 2009) 8, 9

Walton v. Spherion Staffing LLC,
No. CIV.A. 13-6896, 2015 WL 171805
(E.D. Pa. Jan. 13, 2015) 6

Whyte v. Connecticut Mut. Life Ins. Co.,
818 F.2d 1005 (1st Cir. 1987) 11

CONSTITUTIONAL PROVISION

U.S. CONST. amend. IV 7, 9, 14

STATUTES

42 U.S.C. § 2000aa–11(a)(3) 11-12

42 U.S.C. § 12132 ..... 2, 15

42 U.S.C. § 12182(b)(3) 16

REGULATIONS

28 C.F.R. § 35.104 16

28 C.F.R. § 35.139 16

29 C.F.R. § 1630.2(g) 6

29 C.F.R. § 1630.2(h)(2) 6

OTHER AUTHORITIES

2 LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 5.4(c) (2d ed. 1987) 14

135 CONG. REC. S10779 (daily ed. Sept. 7, 1989) 6

Kelley Bouchard, *Across Nation, Unsettling Acceptance when Mentally Ill in Crisis are Killed*, PORTLAND PRESS HERALD (Dec. 9, 2012), http://www.pressherald.com/2012/12/09/shoot-across-nation-a-grim-acceptance-when-mentally-ill-shot-down/ 9

H.R. REP. NO. 92-920 (1972) (Conf. Rep.), *reprinted in* 1972 U.S.C.C.A.N. 2062 11

Michael L. Perlin, *The ADA and Persons with Mental Disabilities*, 8 J.L. & HEALTH 15 (1994) 6

S.F. Police Dept. Gen. Order 8.02 (Aug. 3, 1994) 19

E. TORREY, OUT OF THE SHADOWS (1997) 11

INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Policy Council on Law Enforcement and the Mentally Ill ("Policy Council") is an unincorporated association of individuals and organizations that share a common interest in improving the interface between law enforcement and the mentally ill. *Amicus* members are all persons or organizations that either suffer from, have family members who suffer from, or have dedicated themselves to providing care and improving life circumstances for those with mental illness.

Amicus includes family members who have lost loved ones in circumstances similar to those at issue in this case. Policy Council member Myrna Torres is the mother of the late Andrew Orval Torres, who died in his bedroom while Greenville City Police were attempting to take him into protective custody pursuant to a Probate Court Order which directed that Andrew be taken to the hospital for psychiatric assessment. Mr. Torres suffered from schizophrenia of the paranoid type (DSM-IV 295.30). The three uniformed officers knew of Mr. Torres' mental condition, but nevertheless appeared at his bedroom doorway, in spite of his sisters' specific requests that they remain in the living room so that his sisters could bring Mr. Torres out to the officers. On seeing the officers quickly

---

[1] The parties have consented to the filing of *amicus curiae* briefs in support of either party in letters on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

moving toward him, Mr. Torres attempted to barricade himself in his bedroom by closing the door. He died of positional asphyxia after a struggle in which he was repeatedly struck with a TASER® and hog-tied in a prone position.

As individuals, Policy Council members live under the weight of public indifference, prejudice, and stigma. As a group, its members have been able to move from being reactive to specific personal events to being proactive in the law enforcement policymaking realm. The Policy Council collectively advocates before appropriate public bodies to advance the most effective tactics and techniques for dealing with persons with mental illness, including offering programs for police regarding therapeutic alternatives to crisis training.

In large part, the Policy Council's purpose is to advocate for implementation of policies which result in reasonable accommodations for those suffering from mental illness, pursuant to the Americans with Disabilities Act, as codified at 42 U.S.C. § 12132. Any decision from this Court which undermines or limits that purpose, particularly with respect to law enforcement, would substantially undermine the Policy Council's effectiveness. Being intimately familiar with the civil commitment and arrest processes, as well as the importance of well-considered policies, the Council promotes the use of de-escalation tactics in arrest and civil commitment scenarios involving persons with mental illness.

Members of the Policy Council share a specific concern about an increase in the number of avoidable incidents of violence between law enforcement and persons with mental illness. Of particular concern to the Policy Council is the use of deadly force in circumstances, such as were present in Respondent's case, in which an individual's mental health conditions are known to law enforcement prior to their arrival, the individual presents no immediate risk to others, and the police are present not to arrest the individual but to transport them to a healthcare facility for assessment and possible treatment. *Amicus'* central concern in this case is to prevent any relaxation of the ADA's "reasonable accommodation" requirement to benefit law enforcement agencies at the expense of persons with mental illness.

SUMMARY OF THE ARGUMENT

It is critical to the safety and well-being of those suffering from mental illness, as well as their loved ones, that the Americans with Disabilities Act (ADA) apply vigorously to police encounters. As Congress and the courts have long recognized, people suffering with mental illness are acutely vulnerable and deserving of protection. The ADA is essential to, and was designed with the purpose of, protecting such persons. Under both the ADA and the Fourth Amendment, officers are required to account for mental illness when effectuating arrests or civil detention. The rule proposed by Petitioners would modify the existing rule with respect to the ADA and undercut important safeguards designed to protect the well-being of persons with mental illness.

The public needs assurance that the ADA will apply, and that police will not unnecessarily escalate the situation, when requests are made for law enforcement assistance in making an involuntary mental health commitment. Public policy concerns, rooted in the importance of encouraging people who need help to seek it, counsel for sustaining the ADA accommodation requirement's applicability. In barricade situations involving mentally ill individuals, there should rarely be a question as to the Act's applicability. Moreover, fairness and equity suggest that the ADA accommodation requirement should apply when officers are present for the sole purpose of assisting persons suffering from mental illness.

The ADA's implementing regulations are already clear that police are not required to accommodate the disability of someone who poses a direct and immediate threat to the safety of others. This objective test should continue to apply, and this standard is sufficient to protect the public and police officers alike.

ARGUMENT

I. THE ADA MUST APPLY VIGOROUSLY TO POLICE ENCOUNTERS WITH PEOPLE WITH MENTAL ILLNESSES BECAUSE THEY ARE PARTICULARLY VULNERABLE.

Of all groups with impairments, those with mental illness are among the most vulnerable and in need of ADA protection. Persons with mental illness are, first, least able to communicate and understand others' efforts at communication—particularly if the mental illness has manifested into a full-scale psychotic episode. Second, it is the seriously mentally compromised individual who is most likely to be confronted by police. Other persons with disabilities, such as those who use a wheelchair or those who are blind, are less likely to require law enforcement interventions when needing medical or other assistance. Being in a psychotic state, on the other hand, is sure to provoke public reaction and result in police interaction.

A. The ADA Is Essential To, And Was Designed With The Purpose of, Protecting Persons With Mental Illness.

"The legitimacy of the State's interests in ensuring that 'dangerous' mentally ill persons not harm themselves or others is beyond dispute." *McCabe v. Life-Line Ambulance Serv., Inc.*, 77 F.3d 540, 547 (1st Cir. 1996) (citations omitted). "[P]ublic policy favors protecting the mentally ill and developmentally disabled from abuse or

mistreatment, to which they are particularly vulnerable, often being without the knowledge, ability, or resources to protect or vindicate their civil rights." *Fees v. Trow*, 521 A.2d 824, 828 (N.J. 1987); *see also Walton v. Spherion Staffing LLC*, No. CIV.A. 13-6896, 2015 WL 171805, at *1 (E.D. Pa. Jan. 13, 2015). Congress sought to further this legitimate interest when it passed the accommodation requirement of the ADA.

The legislative history of the Act makes clear that Congress fully intended the ADA to provide legal protections to individuals, such as Ms. Sheehan, who suffer from schizoaffective disorders. *See* 135 CONG. REC. S10779 (daily ed. Sept. 7, 1989) (remarks of Sen. Domenici) (advocating on behalf of individuals with schizophrenia and manic-depression and suggesting President Lincoln suffered from such disturbances). Following efforts from Sen. Helms to exclude them from the ADA's coverage, Congress specifically "expanded the bill's coverage to mentally ill persons." Michael L. Perlin, *The ADA and Persons with Mental Disabilities*, 8 J.L. & HEALTH 15, 19 n.23 (1994). The regulations presently promulgated pursuant to the ADA define "disability" to include "mental impairment[s] that substantially limit[] one or more major life activities," 29 C.F.R. § 1630.2(g) (2012), and list "organic brain syndrome" and "mental illness" among the covered class of mental impairments, § 1630.2(h)(2).

B. Both the Fourth Amendment and the ADA Rightly Require Officers to Account for the Purpose of the Interaction as Well as for Mental Illness When Effectuating Arrests or Civil Detention.

Although all police interactions contain some level of inherent risk, it is important with respect to both the Fourth Amendment and the ADA that officers not lose sight of what it is they are trying to accomplish. Assessing the reasonableness of an officer's use of force "requires careful attention to the severity of the crime at issue[.]" *Graham v. Connor*, 490 U.S. 386, 396 (1989) (internal quotations and citations omitted). Similarly, "mental illness must be reflected in any assessment of the government's interest in the use of force[.]" *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1058 (9th Cir. 2003). In situations where "a mentally disturbed individual [is] not wanted for any crime, [and is] being taken into custody to prevent injury to himself," it is clear that "[d]irectly causing him grievous injury does not serve that objective in any respect." *Id.* at 1059.

In the ADA context, an officer's decision whether to accommodate an individual's mental illness for ADA purposes "depends on all of the factual circumstances of the case, including 'the nature of the criminal activity involved[.]' " *Bahl v. Cnty. of Ramsey*, 695 F.3d 778, 785 (8th Cir. 2012) (quoting *Bircoll v. Miami-Dade Cnty.*, 480 F.3d 1072, 1087 (11th Cir. 2007)). "In the context of arrests, courts have recognized Title II claims [for] reasonable accommodation, where police properly

arrest a suspect but fail to reasonably accommodate his disability during the arrest, causing him to suffer greater injury or indignity than other arrestees." *Waller ex rel. Estate of Hunt v. Danville, VA*, 556 F.3d 171, 174 (4th Cir. 2009) (citing *Gohier v. Enright*, 186 F.3d 1216, 1220–21 (10th Cir. 1999); *Gorman v. Bartch*, 152 F.3d 907, 912–13 (8th Cir. 1998)); *see also Roberts v. City of Omaha*, 723 F.3d 966, 973 (8th Cir. 2013) ("[T]he ADA and the Rehabilitation Act apply to law enforcement officers taking disabled suspects into custody."). Among other things, the ADA accommodation inquiry looks to whether the challenged "decision was based on an individualized inquiry as to the plaintiff's conditions," *Buchanan v. Maine*, 469 F.3d 158, 176 (1st Cir. 2006) (citing *Kiman v. New Hampshire Dep't of Corr.*, 451 F.3d 274, 284–85 (1st Cir. 2006)), and whether officers "acted in a manner that escalated tensions" or "attempted to calm the situation[.]" *Waller*, 556 F.3d at 177.

If sustained, Petitioner's request that the Court hold that Ms. Sheehan's conduct while barricaded behind a closed door posed a "direct threat" sufficient to remove her from the ambit of the ADA's accommodation requirement would endanger persons with mental illness. As representatives of the impacted class, *Amicus'* principal concern is that such a holding would have the effect of excusing officers from having to take into account known mental illness in situations where "the constraints of time" do not impinge upon their ability to give individualized consideration to the individual engaging in the threatening behavior. *Waller*, 556 F.3d at 175. This is a dangerous

proposition when already "at least half" of fatal police encounters involve persons with psychiatric disabilities. *See* Kelley Bouchard, *Across Nation, Unsettling Acceptance when Mentally Ill in Crisis are Killed*, PORTLAND PRESS HERALD (Dec. 9, 2012), http://www.pressherald.com/2012/12/09/shoot-across-nation-a-grim-acceptance-when-mentally-ill-shot-down/. Such a finding is also unnecessary, since, as the Fourth Circuit has explained, "it is clear that exigency is not irrelevant. Reasonableness in law is generally assessed in light of the totality of the circumstances, and exigency is one circumstance that bears materially on the inquiry into reasonableness under the ADA." *Waller*, 556 F.3d at 175; *see also De Boise v. Taser Int'l, Inc.*, 760 F.3d 892, 899 (8th Cir. 2014) ("[W]hether officers reasonably accommodated the individual is 'highly fact-specific and varies depending on the circumstances of each case, including exigent circumstances[.]").

An officer's use of excessive force should have some bearing on whether the officer's failure to accommodate an arrestee under the ADA was reasonable. Under the Fourth Amendment, the nature of Ms. Sheehan's seizure was unreasonable when viewed through the prism of all four *Graham* factors. *See Graham v. Connor*, 490 U.S. 386 (1989). The "severity of the crime at issue" was non-existent. *Id.* at 396. Officers first arrived on the scene to help her get an in-patient mental health assessment. Prior to their decision to force entry, Ms. Sheehan did not "pose[] an immediate threat to the safety of the officers or others." *Id.* As she was not under arrest, she could not fairly be said to have been

"resisting arrest," nor could it be argued that she was in any position to "evad[e] arrest by flight." *Id.* The failure to account for Ms. Sheehan's disability and the level of force used—5 gunshots, including one to the face—was unreasonable, given the totality of the circumstances.

II. THE PUBLIC NEEDS ASSURANCE THAT THE ADA WILL APPLY, AND THAT POLICE WILL NOT UNNECESSARILY ESCALATE THE SITUATION, WHEN REQUESTS ARE MADE FOR LAW ENFORCEMENT ASSISTANCE IN MAKING AN INVOLUNTARY MENTAL HEALTH COMMITMENT.

As Respondent explains, "The central thrust of [the] ADA claim is that [the police] were required to consider her mental disability *before* they reopened her door and forced a violent confrontation." Resp. Br. 33. There is a strong public policy reason for sustaining this accommodation requirement, as it provides an important assurance to families seeking police assistance in making mental health commitments. Families of persons experiencing mental health crises need to know that officers will not deliberately engage in behavior that is reasonably likely to provoke a violent response from the person in need of help. The applicability of the accommodation requirement increases the likelihood that families of people who need help will in fact seek it.

A. Public Policy Concerns Counsel for Sustaining the ADA Accommodation Requirement's Applicability.

Lower courts have correctly recognized that, as a matter of public policy, it is important that police departments avoid practices that might "dissuade [those] who need treatment from seeking help." *Whyte v. Connecticut Mut. Life Ins. Co.*, 818 F.2d 1005, 1010 n.13 (1st Cir. 1987). Congress, likewise, has explicitly recognized the danger of adopting policies that "discourage [people] from seeking the treatment they must have " H.R. REP. NO. 92-920 (1972) (Conf. Rep.), *reprinted in* 1972 U.S.C.C.A.N. 2062, 2072 (discussing necessity of maintaining patient confidentiality in drug treatment programs). The nation already faces a significant problem with respect to persons suffering from mental illness who, for a variety of reasons, are not receiving treatment. *See, e.g., Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 608 (1999) (Kennedy, J., concurring) (" 'During the course of a year, about 5.6 million Americans will suffer from severe mental illness.' Some 2.2. million of these persons receive no treatment." (quoting E. TORREY, OUT OF THE SHADOWS 4, 6 (1997))).

The public has a clear interest in seeing that people suffering from debilitating mental illness seek treatment. The courts and Congress have often thus taken this specific public interest into account when evaluating the contours of policies that might dissuade people from seeking medical help. *See, e.g., Klitzman, Klitzman & Gallagher v. Krut*, 744 F.2d 955, 958 n.1 (3d Cir. 1984) (discussing 42 U.S.C.

§ 2000aa–11(a)(3)'s "special concern" for criminal laws that "would intrude upon a known confidential relationship such as that which may exist between doctor and patient"); *Hicks v. Talbott Recovery Sys., Inc.*, 196 F.3d 1226, 1236 n.22 (11th Cir. 1999) (discussing Georgia statute protecting "the communications of the patient who seeks treatment for mental disorders" (internal citations omitted)).

B. The ADA Accommodation Requirement Should Apply Where Mentally Ill Persons Are Barricaded and Not Posing an Immediate Threat.

In a barricade situation involving a person with mental illness, there should rarely be any question as to the ADA's applicability. As Ms. Sheehan's case illustrates, knocking the door down and forcing an armed confrontation is unlikely to lead to a safe resolution of such a situation. "Saving lives remains job number one for every law enforcement agency, and it is imperative that they have procedures in place to deal with those persons who are mentally ill, or [who are] otherwise likely to react poorly in already volatile situations." *Elizondo v. Green*, 671 F.3d 506, 511–12 (5th Cir. 2012) (DeMoss, J., specially concurring).

Some courts impose liability on police officers whose response to situations unnecessarily exacerbates the danger faced by members of the public. Numerous courts have recognized "a right to state protection where 'the state affirmatively places [an] individual in a position of danger the individual would not have otherwise faced.' " *Perez v. Town of*

Cicero, No. 06 C 4981, 2011 WL 4626034, at *7 (N.D. Ill. Sept. 30, 2011) (quoting *Estate of Stevens v. City of Green Bay*, 105 F.3d 1169, 1174 (7th Cir. 1997)). Many circuits explicitly recognize this "state-created danger" theory of liability for "acts committed by the state or state actors using their peculiar positions as a state actors [to] leav[e] a discrete plaintiff vulnerable to foreseeable injury." *Kneipp v. Tedder*, 95 F.3d 1199, 1208 (3d Cir. 1996) (quoting *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1153 (3d Cir. 1995)); *see also McClendon v. City of Columbia*, 305 F.3d 314, 330 (5th Cir. 2002) (noting that at least "six circuits" had recognized "the existence of a right to be free from state-created danger" as of 1993). The ADA's requirement that officers take known disabilities into account helps mitigate this same kind of danger by requiring that officers consider the impact their actions may have on discretely vulnerable individuals—those whom it is foreseeable are likely to react in a manner that, for reasons beyond their control, leaves them acutely vulnerable to the use of deadly force.

C. Fairness and Equity Suggest the ADA Accommodation Requirement Should Apply When Officers are Present for the Sole Purpose of Assisting Persons Suffering from Mental Illness.

Recognizing the complexities of modern policing, courts in the "majority of states have acknowledged [a] community safety and welfare role of police officers and have adopted in some form or another a 'community caretaker' exception to the general warrant requirement[.]" *Ullom v. Miller*, 705

S.E.2d 111, 120 (W. Va. 2010). This exception, rooted in the Court's decision in *Cady v. Dombrowski*, 413 U.S. 433 (1973), "acknowledge[s] a non-investigatory, community role for law enforcement personnel apart from traditional law enforcement duties." *Ullom*, 705 S.E.2d at 121. Among these non-investigatory roles is the responsibility "to take into custody mentally ill individuals who are a danger to themselves or others," a task authorized by statute in all fifty States. *See* Pet. Br. 38 n.5.

The caretaker exception accommodates police officers who engage in certain conduct (e.g., warrantless searches) that might otherwise violate the Constitution if engaged in for traditional criminal law enforcement purposes. It is rooted, at least in part, in a recognition that it would be inequitable to penalize officers who, acting in a good faith community caretaking role, are simply fulfilling the "expect[ation] to 'aid individuals who are in danger of physical harm,' [and] 'assist those who cannot care for themselves[.]' " *Ullom*, 705 S.E.2d at 121 (quoting *Wagner v. Hedrick*, 383 S.E.2d 286, 293 n.9 (W. Va. 1989) (quoting 2 LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 5.4(c) at 525 (2d ed. 1987) (footnotes omitted)). The exception, in effect, permits conduct that society otherwise disfavors if it is engaged in for some kind of caretaking, as opposed to criminal law enforcement, function.

In the instant case, officers who were on the scene to assist a woman who could not care for herself instead "affirmatively place[d] [her] in a

position of danger [she] would not have otherwise faced." *Estate of Stevens v. City of Green Bay*, 105 F.3d 1169, 1174 (7th Cir. 1997). Had the officers searched, instead of shot, Ms. Sheehan, there would be little question as to whether they could avail themselves of the caretaker exception. As such, to hold that the officers bore no responsibility to take account of Ms. Sheehan's disability, given their decision to needlessly and immediately escalate the situation, would be "offensive to fairness and equity." *Escobedo v. State of Ill.*, 378 U.S. 478, 490 n.13 (1964) (noting that the "survival of our system and the values which it advances depends upon a constant, searching, and creative questioning of official decisions" (internal citations omitted)).

In this case, Officer Reynolds "testified that she did *not* consider Sheehan's 'psychiatric disability' when she instructed Holder to forcibly open the door to Sheehan's room." Resp. Br. 6. (quoting J.A. 266). This order was given despite the presence of immediately available "reasonable alternatives." *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 453–54 (1990). This decision, and the avoidable confrontation that it provoked, ultimately had life-altering consequences for Ms. Sheehan for reasons that were largely beyond her ability to control. This is the very scenario that the ADA was designed to safeguard against. *See* 42 U.S.C. § 12132 (prohibiting discrimination "by reason of disability").

III. EXISTING RULES ARE SUFFICIENT TO PROTECT OFFICER SAFETY, AND THE COURT SHOULD NOT MAKE IT MORE DIFFICULT FOR PERSONS WITH MENTAL ILLNESS TO MAKE A REASONABLE ACCOMMODATION CLAIM UNDER THE ADA.

This case, and this record, does not provide an appropriate vehicle to fashion a new test for reasonable accommodation claims involving arrests under the ADA, as proposed by the United States.

A. Existing ADA Rules, Which Require Individualized Inquiry Into the Nature of the Danger, Are Sufficient to Protect the Important Safety Interests of Police Officers Who Might Be Endangered By the Accommodation of an Armed Mentally Ill Individual.

Existing ADA regulations are sufficient to protect the important safety interests of police officers who might be endangered by the accommodation of an armed mentally ill individual. Federal regulations currently exempt officers from providing ADA accommodations to persons posing a "direct threat" to the safety of others. "Direct threat means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services as provided in § 35.139." 28 C.F.R. § 35.104. As the Court has explained, "The ADA's direct threat provision, § 12182(b)(3) [is aimed at] reconcil[ing] competing interests in

prohibiting discrimination and preventing 'a significant risk to others[.]' The existence of a significant risk is determined from the standpoint of the professional who refuses accommodation, and the risk assessment is based on evidence available to him and his profession " *Bragdon v. Abbott*, 524 U.S. 624, 626–27 (1998) (quoting *Sch. Bd. of Nassau Cnty., Fla. v. Arline*, 480 U.S. 273, 287 n.16 (1987) (internal citations omitted)).

Critically, whether an individual in fact poses a "significant risk" sufficient to take them outside the realm of the ADA's protection is a determination that is "not simply [based] on [an officer's] good-faith belief that a significant risk existed." *Id.* Rather, it requires an "individualized inquiry" into the nature, duration, and severity of the danger, as well as consideration of the probability that the danger will cause additional harm. *See Estate of Mauro By & Through Mauro v. Borgess Med. Ctr.*, 137 F.3d 398, 409 (6th Cir. 1998) (internal citations omitted). Any contrary rule for persons with mental illness would be "discriminatory on its face, because it [would] rest[] on stereotypes of the disabled rather than an individualized inquiry into the [individual]'s condition—and hence [would be] 'unreasonable' in that sense." *Lesley v. Hee Man Chie*, 250 F.3d 47, 55 (1st Cir. 2001).

B. Because an Attempt at Negotiation—Not Violent Confrontation—Is the Reasonable Policy Under the Facts of This Case, the Imposition of a 'Special Circumstances' Test is Inappropriate.

The nature of the officers' conduct in this case was patently unreasonable and should not give rise to a new rule adding to the burden that persons with mental illness face in demonstrating that they were owed a reasonable accommodation under the ADA.

In its brief to the Court, the United States argues

> To defeat a motion for summary judgment, a plaintiff raising a failure-to-accommodate claim must "show that an 'accommodation' seems reasonable on its face, *i.e.*, ordinarily or in the run of cases." Because a deviation from ordinary police procedures in this type of arrest situation generally will involve a significant threat to the officers or others on the scene, an accommodation will not be reasonable in the run of cases. [As such], the ADA plaintiff bears the burden of "show[ing] that special circumstances warrant a finding that * * * the requested accommodation is 'reasonable' on the particular facts."

Brief for United States as *Amicus Curiae* Supporting Vacatur in Part and Reversal in Part at 17–18, *City and County of San Francisco, et al. v. Teresa*

Sheehan, No. 13-1412 (2015) (quoting *United Airways, Inc. v. Barnett*, 535 U.S. 391, 401, 405 (2002)). The Ninth Circuit did not address this argument because it was not raised below, and there is no inter-circuit conflict regarding this test because no other courts have addressed it either.

There also is a clear irony in this position. Officers Holder and Reynolds "deviat[ed] from ordinary police procedures," and in doing so, created a "significant threat" to the safety of all parties involved. The threat was especially great to Ms. Sheehan, a woman who they were on the scene to help and knew to be mentally ill. The United States nevertheless argues that Ms. Sheehan must "bear[] the burden of 'show[ing] that special circumstances warrant a finding' " that she was owed an accommodation for her disability. Yet the accommodation Ms. Sheehan was owed was itself the "ordinary police procedure[]" of the San Francisco Police Department for barricade situations. *See* J.A. 305–06, 311–14 (describing San Francisco Police Department training regarding interactions with mentally ill individuals); *see also* S.F. Police Dept. Gen. Order 8.02 (Aug. 3, 1994), at IIB (directing officers "to attempt a negotiated surrender").

Rather than attempt negotiation and de-escalation tactics, as required by their training, the policy regarding barricaded suspect incidents, and the ADA, the officers instead forced open her door and shot her—an outcome as foreseeable as it was avoidable. It is difficult to conclude that the officers acted reasonably when the use of this kind of tactic in such a situation was actively discouraged by the

department. *See generally Gutierrez v. City of San Antonio*, 139 F.3d 441, 448–49 (5th Cir. 1998).

Photo: Teresa Sheehan's building in San Francisco. The window to Ms. Sheehan's room, where she had barricaded herself, is pictured third from the left and second down from the roof.

The decision to force entry seems especially ill-informed when one takes into account the location of the room in which Ms. Sheehan had barricaded herself. The room was not on the ground level, and escape via the window was not a viable option, as the picture above makes clear. In other words, she was alone, trapped, and surrounded.

The United States' argument that "a deviation from ordinary police procedures in this type of arrest

situation generally will involve a significant threat to the officers or others" is true, although not in the way it is intended. If "ordinary police procedure" is taken to mean "attempt a negotiated surrender" (the policy of SFPD), and "this type of arrest situation" is taken to refer to situations in which a known mentally ill person is barricaded alone in a room with no means of escape, then the government is correct: a deviation from a negotiation protocol "generally will involve a significant threat to the officers or others" by unnecessarily injecting violence into what is otherwise a tense but non-violent barricade situation.

Here, Ms. Sheehan's act of barricading herself in her bedroom "afforded [officers] a reasonable opportunity to deliberate various alternatives prior to electing a course of action." *Terrell v. Larson*, 396 F.3d 975, 983 (8th Cir. 2005) (quoting *Neal v. St. Louis Co. Bd. of Police Comm'rs*, 217 F.3d 955, 958 (8th Cir. 2000)). Despite the fact that back-up officers were in the process of surrounding the building and making their way up the stairs, J.A. 130, 324, 407, the officers outside Ms. Sheehan's bedroom door decided to force entry when there was no immediate need to do so.

Amicus represents, as well as counts amongst its membership, persons who suffer with mental illness and face the prospect of involuntary civil commitment effectuated by the police. As individuals directly impacted by determinations regarding the ADA's applicability in civil commitment and arrest situations, members of the Council are particularly concerned about the United

States' argument that Ms. Sheehan "bears the burden of 'show[ing] that special circumstances warrant a finding that * * * the requested accommodation is 'reasonable' on the[se] particular facts." Because an attempt at negotiation—not violent confrontation—is the reasonable policy under the facts of this case, the imposition of a "special circumstances" test is inappropriate.

This was not an "on-the-street disturbance[]" where officers were struggling to "secur[e] the scene," as was the case in *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000)—a case the district court improperly relied upon earlier in this litigation. *See* Pet. App. 79. This case does not give cause for the Court to consider a new Title II "special circumstances" test, as was the case in *Barnett*, 535 U.S. at 405, since here there is no evidence that the "requested accommodation conflicts with the rules" of engagement for dealing with barricaded persons, *id.* at 394. Instead, the simple, objective test that the law has traditionally required should be applied. This standard is sufficient to protect the interests of arrestees, the police, and the public alike.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

Anita S. Earls
Ian A. Mance
SOUTHERN COALITION
FOR SOCIAL JUSTICE
1415 W. NC Hwy. 54, #101
Durham, NC 27707
(919) 323-3380
anita@scsj.org
ianmance@scsj.org

William Harry Ehlies, II
Counsel of Record
310 Mills Avenue, #201
Greenville, SC 29605
(864) 232-3503
hank@ehlieslaw.com